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#319

THE

TRIALS

OF

GEORGE ROBERT FITZGERALD, Esq; TIMOTHY BRECKNOCK, JAMES FULTON, AND OTHERS,

FOR THE PROCUREMENT OF, AND FOR THE

MURDER

OF

PATRICK RANDALL Mc.DONNELL AND CHARLES HIPSON.

ALSO

The TRIAL of JOHN GALLAGHER and OTHERS, for an ASSAULT on GEORGE ROBERT FITZGERALD, in the Gaol of Castlebar.

The SPEECH of GEORGE ROBERT FITZGERALD, Esq; previous to his receiving Sentence—the ARGUMENTS of COUNCIL—the Lord Chief Baron YELVERTON's SPEECH on passing their Sentences—the whole PROCEEDINGS of the COURT—together with a DESCRIPTION of their CONDUCT at the Place of Execution.

TAKEN FROM THE NOTES OF A GENTLEMAN.

DUBLIN:

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ADVERTISEMENT.

THE Editor of theſe Trials, when he firſt undertook to publiſh, intended to take notice of very little more than the teſtimony of the witneſſes; and feeling that the Trials would in any form ſwell to an extraordinary length, he endeavoured to compreſs them as much as poſſible, by putting the evidence of each witneſs in one continued narrative rather than by way of queſtion and anſwer. However, when he came to Dublin, having taken a note of the arguments, he was prevailed with by ſome of his learned friends, to publiſh the arguments and charges alſo. In his preparation of them for the preſs, he has had aſſiſtance, which he muſt at all times feel with gratitude, but which he cannot venture publicly to mention without an affectation of parade. This, however, he muſt ſay, that the very eloquent ſpeeches of the Chief Baron on the paſſing ſentence on Mr. Fitzgerald and Mr. Brecknock, and

Mr.

Mr. Fitzgerald's ſpeech before he received ſentence, and alſo the account of the behaviour of the priſoners at the place of execution, would, at leaſt, not at preſent have appeared before the public, but for the aſſiſtance of a gentleman, whoſe politeneſs and attention are only exceeded by his ability.

DUBLIN, June 22, 1786.

PROCEEDINGS, &c.

ASSIZES AT CASTLEBAR.

MONDAY, APRIL 10, 1786.

THE Lord Chief Baron Yelverton, and Mr. Baron Power, after reading their commiſſion, adjourned to the next day.

TUESDAY, APRIL 11, 1786.

The following Grand Jury were ſworn:

Sir Neal O'Donnell, Bart. Foreman.

Right Honourable James Cuffe,
Honourable Henry Browne,
Thomas S. Lindſay, Eſq;
Charles Coſtello, Eſq;
John Bingham, Eſq;
Thomas Lindſay, ſenior, Eſq;
Thomas Lindſay, junior, Eſq;
Francis Knox, Eſq;
Arthur French, Eſq;
George Miller, Eſq;
Chriſtopher Bowen, Eſq;
William Ruttlege, Eſq;
Hugh O'Donnell, Eſq;
James Browne, Eſq;
Thomas Ormſby, Eſq;
John Ormſby, Eſq;

Richard Blake, Eſq;
Edward Browne, Eſq;
William Brabazon, Eſq;
George O'Maley, Eſq;
William Oram, Eſq;
James O'Donnell, Eſq;

After the Chief Baron had given his charge, Mr. *Stanley* then moved the Court for liberty to admit Counſel, and his Agents to Mr. Fitzgerald. He ſtated, that ſince the revolution there had not been an example of ſuch ſeverity as had been practiced towards Mr. Fitzgerald ſince his commitment; that in the caſe of the aſſaſſins, in the reign of King William, it had not been ſo; and alſo in the caſe of Lord Winton and Lord Lovat, though committed for high treaſon againſt the ſtate, all the priſoners, through the benignity of the times, were allowed counſel to attend them in priſon previous to their trials. He cited many other caſes.

The *Chief Baron* interrupted him, ſaying, there is no occaſion to make any parade about it; if there had been a private application to the Attorney General, who was then in his eye, he did not doubt but every reaſonable indulgence would be given to him.

The *Attorney General* then ſaid, that he underſtood every thing which was conſiſtent with the ſafe keeping of Mr. Fitzgerald had been, and would continue to be done.

The Hon. *Dennis Browne*, High Sheriff, begged leave to ſay a few words. He had been obliged to order Mr. Fitzgerald under cloſe confinement, from attempts made by himſelf—he had endeavoured to bribe the Sub-ſheriff to permit him to eſcape.

eſcape. He was going to ſtate other matters, but was interrupted by the *Chief Baron*, who ſaid, that ſtating ſuch facts might tend to prejudice the minds of men who might, perhaps, be on the Petit Jury that were to try Mr. Fitzgerald.

Mr. *O'Farrell* then moved, that Mr. T. Burgeſs might be admitted to Mr. Fitzgerald. He ſtated, that he was a perſon abſolutely neceſſary to him, for pecuniary purpoſes.

The High Sheriff ſaid, he did not think it prudent to admit him to Mr. Fitzgerald. However, after ſome argument, the Chief Baron was pleaſed to order that Mr. Burgeſs ſhould be admitted, all neceſſary precautions being taken; alſo his Agent, Mr. John Lynott, and one or two of his Counſel, who are Mr. Ferrall, Mr. Stanley, and Mr. Owen.

The *Chief Baron* ordered the ſeveral perſons charged with murder to be brought up to-morrow, in order to their arraignment.

The Court then proceeded to the ordinary buſineſs, after which they adjourned to the next day.

WEDNESDAY, APRIL 12, 1786.

The ſeveral perſons charged with murder were brought up to be arraigned.

As ſoon as the Judge had taken his ſeat, Mr. Brecknock ſtated to the Court that he was weak and infirm through age, and applied to be let within the bar, that he might ſit. The Chief Baron told him, he could not comply with his requeſt, but that a chair ſhould be provided for him, that he might ſit in the dock.

Mr. *Stanley* ſaid, that counſel on behalf of Mr. Fitzgerald had a motion to ſubmit to Court, and Mr. *O'Farrell* went on to lay the ill ſtate of Mr. Fitzgerald's health before his Lordſhip, and his having been plundered by a mob, after the unhappy accident.

The *Attorney General* ſaid, that he ſuppoſed this was to be a ſecond edition of the application of yeſterday.

Mr. *Stanley* replied, it was not; and ſaid, tho' his client was not able to procure an affidavit from a phyſician, that his health was ſo precarious—or from a ſurgeon, that his ſtate was ſo uncertain that he could not attend, and tho' he could not himſelf in truth make ſuch an affidavit, yet he truſted to be able to lay before the Court ſuch an affidavit, as to his ſtate of his mind, as to induce his Lordſhip to poſtpone the trial. He alſo ſaid he had an application to make to his Lordſhip's humanity, which was, to requeſt his Lordſhip to go down to the gaol to take his affidavit, as from the treatment Mr. Fitzgerald had received, he had been confined to his bed, and could not come to the court in any other manner, and he believed it was a frequent practice for Judges to go to the gaol of Newgate, in Dublin, for ſimilar purpoſes, and hoped his Lordſhip would ſo far favour his client.

The *Attorney General* aſked Mr. Stanley, if he meant to put off the trial before Mr. Fitzgerald had pleaded?

The *Chief Baron* aſked, was there any affidavit that Mr. Fitzgerald's ſtate of health was ſuch that he could not with ſafety come into court to be arraigned?

Mr.

Mr. *O'Farrell* begged five minutes time to conſult with Mr. Fitzgerald, whether he could make ſuch an affidavit, which being granted, his counſel went to him, and after a ſtay of about a quarter of an hour returned.

Mr. *Ulick Burke* then ſtated, that with ſafety to his life, Mr. Fitzgerald could not come into court.

The *Chief Baron* aſked, if Mr. Fitzgerald had been viſited by any perſon of medical ſkill ?

Mr. *Owen* declared that Mr. Fitzgerald ſtill languiſhed under injuries received, while in the cuſtody of the law, from the moſt ſavage and brutal barbarity, and hoped his Lordſhip would take the affidavit.

Mr. *Ulick Burke* alledged, that Mr. Fitzgerald laboured under extreme illneſs, and that a violent raſh on his ſkin made it unſafe for him to leave his bed.

Mr. *Stanley* then ſtated an affidavit, which Mr. Fitzgerald propoſed to make to put off his trial, in which it was alledged that his ſtate of health was ſuch as not to be able to take his trial at the preſent aſſizes.

The *Attorney General* obſerved, that it had been ſtated by counſel that Mr. Fitzgerald could not make ſuch an affidavit as was now propoſed, but ſo ſoon as his counſel were admitted to him, the very affidavit which he could not make, was now to be prepared.

The *Chief Baron* agreed with the Attorney General, that the facts were certainly ſo.

Mr.

Mr. *Stanley*, to exculpate himſelf, ſaid, that he had no previous conſultation with Mr. Fitzgerald, and had miſconceived his ſtate of health.

The *Chief Baron* informed him, that no perſon accuſed him of improper conduct; and it being ſuggeſted by a gentleman in court, that Dr. Boyd, the phyſician who had attended Mr. Fitzgerald, was then in court, the Chief Baron directed him to viſit Mr. Fitzgerald, and report his ſtate of health; and the Court adjourned for half an hour.

The court being again opened, Dr. Boyd, on the ſuggeſtions of Mr. M'Carty, one of Mr. Fitzgerald's counſel, was ſworn. He declared that Mr. Fitzgerald might be brought up warmly covered, or in his bed, as he alledged that he had no cloaths; that his long lying in a horizontal poſture had made it, perhaps, leſs ſafe for him to come in any other manner; and that contrary to all patients he had known, who generally deſired to leave their beds, he could not prevail upon Mr. Fitzgerald to quit his, nor could he induce him to take animal food, which would have ſpeedily amended the injuries he had ſuſtained by loſs of blood.

The *Chief Baron* ordered him to be brought up, with proper precautions, in his bed.

Mr. *M'Carty* then aſked Dr. Boyd, if there was not a raſh on Mr. Fitzgerald? to which the Doctor anſwered in the affirmative, but that it was not dangerous.

The Court then adjourned for half an hour, after which adjournment Mr. Fitzgerald was brought into Court in his bed, and laid on the witneſs's table, where he, together with Timothy Brecknock, &c.

&c. &c. were arraigned on the following indictment:

County of Mayo, to wit. } THE Jurors for our Lord the King, upon their oath, present and say, That George Robert Fitzgerald, late of Rockfield, in the county of Mayo, Esq; Timothy Brecknock, late of the same, Gent. John Fulton, late of the same, weaver, Charles King, late of the same, yeoman, John King, late of the same, yeoman, Abel Fulton, late of the same, yeoman, John Murphy, late of the same, yeoman, James Masterson, late of the same, yeoman, John Cox, late of the same, yeoman, David Saltry, late of the same, yeoman, Philip Cox, late of the same, yeoman, Richy Law, late of the same, yeoman, John Huston, late of the same, yeoman, James Foy, otherwise Sladeen, late of the same, yeoman, William Fulton, late of the same, yeoman, and Samuel Stephenson, late of the same yeoman, with divers other persons, to the Jurors aforesaid at present unknown, not having the fear of God before their eyes, but being moved and seduced by the instigation of the Devil, on the 21st day of February, in the 26th year of the reign of our sovereign Lord George the Third, of Great-Britain, France and Ireland, king, defender of the faith, and so forth, with force and arms, at Gurtnefullagh, aforesaid, in the county aforesaid, in and upon one Charles Hipson in the peace of God and a subject of our said Lord the King within this land of Ireland, then and there being wilfully, traiterously, feloniously and of their malice prepensed, did make an assault; and that the said John Fulton a certain gun of the value of five shillings, then and there charged with gun-powder and one leaden bullet, which gun he the said John Fulton in his right-hand then and there had and held against, and upon the said Charles Hipson then and

and there wilfully, traiterouſly felonioufly and of his malice prepenſed, did ſhoot and diſcharge, and that he the ſaid John Fulton with the leaden bullet aforeſaid out of the gun aforeſaid, then and there by force of the gun-powder aforeſaid ſhot and ſent forth as aforeſaid the aforeſaid Charles Hipſon in and upon *the left ſide* of him the ſaid Charles Hipſon, a *little under the left arm* of him the ſaid Charles Hipſon, then and there with the leaden bullet aforeſaid, out of the gun aforeſaid, by the ſaid John Fulton ſo as aforeſaid, ſhot, diſcharged and ſent forth, wilfully, traiterouſly, and of his malice prepenſed, did ſtrike, penetrate and wound, giving to the ſaid Charles Hipſon then and therewith the leaden bullet aforeſaid ſo as aforeſaid ſhot, diſcharged and ſent forth out of the gun aforeſaid, by the ſaid John Fulton, in and upon the ſaid *left ſide of him the ſaid Charles Hipſon, a little under the left arm of him* the ſaid Charles Hipſon, one mortal wound of the depth of four inches, and of the breadth of half an inch; of which ſaid mortal wound the aforeſaid Charles Hipſon then and there inſtantly died. And that the aforeſaid George Robert Fitzgerald, Timothy Brecknock, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy Law, John Huſton, James Foy, otherwiſe Sladeen, William Fulton, and Samuel Stephenſon, then and there wilfully, traiterouſly, and of their malice prepenſed, were preſent, aiding, helping, abetting, comforting, aſſiſting, and maintaining the ſaid John Fulton the treaſon and murder aforeſaid, in manner and form aforeſaid to do and commit. And ſo the Jurors aforeſaid do ſay, that the ſaid George Robert Fitzgerald, Timothy Brecknock, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy

Richy Law, John Huſton, James Foy, otherwiſe Sladeen, William Fulton, and Samuel Stephenſon, the ſaid Charles Hipſon then and there in manner and form aforeſaid wilfully, traitorouſly, felonioufly and of their malice prepenſed, did ſlee and murder, againſt the peace of our ſaid Lord the King, his crown and dignity, and againſt the form of the ſtatute in ſuch caſe made and provided.

They were then alſo arraigned on the following indictment:

County of Mayo, to wit. } THE Jurors for our Lord the King, upon their oath, preſent and ſay, That George Robert Fitzgerald, late of Rockfield, in the county of Mayo, Gent. Timothy Brecknock, late of the ſame, Andrew Creaghe, otherwiſe Craig, late of the ſame, yeoman, James Foy, late of the ſame, yeoman, John Fulton, late of the ſame, weaver, Charles King, late of the ſame, yeoman, John King, late of the ſame, yeoman, Abel Fulton, late of the ſame, yeoman, John Murphy, late of the ſame, yeoman, James Maſterſon, late of the ſame, yeoman, John Cox, late of the ſame, yeoman, David Saltry, otherwiſe Simpſon, late of the ſame, yeoman, Philip Cox, late of the ſame, yeoman, Richy Law, late of the ſame, yeoman, John Huſton, late of the ſame, yeoman, James Foy, otherwiſe Sladeen, late of the ſame, yeoman, William Fulton, late of the ſame, yeoman, Samuel Stephenſon, late of the ſame, yeoman, John M'Mullen, late of the ſame, yeoman, William Kelly, late of the ſame, yeoman, William and Robert Logan, late of the ſame, yeomen, Wallace Kelly, late of the ſame, yeoman, James M'Cullagh, late of the ſame, yeoman, John Chambers, late of the ſame, yeo-

man, John Chapman, late of the ſame, yeoman, Archibald Newen, late of the ſame, yeoman, John Bernee, late of the ſame, yeoman, Humphry George, late of the ſame, yeoman, Michael Brewing, late of the ſame, yeoman, John Rehenny, late of the ſame, yeoman, William Robinſon, late of the ſame, yeoman, Patrick Dorning, otherwiſe Downey, late of the ſame, yeoman, with divers other perſons, to the Jurors at preſent unknown, not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the Devil, on the twenty-firſt day of February, in the twenty-ſixth year of the reign of our Sovereign Lord George the Third, now king of Great Britain, France and Ireland, defender of the faith, and ſo forth, with force and arms, at Kilnecarra, in the county aforeſaid, in and upon Patrick Randall Mc.Donnèll in the peace of God and a ſubject of our Lord the King, within this land of Ireland, then and there being wilfully, traitorouſly, and of their malice prepenſed, did make an aſſault, and that the ſaid Andrew Craig a certain piſtol of the value of five ſhillings then and there charged with gun-powder and one leaden bullet, which piſtol he the ſaid Andrew Craig in his right-hand then and there had and held againſt, and upon the ſaid Patrick Randall Mc.Donnell then and there wilfully, traitorouſly, and of his malice prepenſed, did ſhoot and diſcharge, and that the ſaid Andrew Craig with the leaden bullet aforeſaid out of the piſtol aforeſaid, then and there by force of the gun-powder aforeſaid ſhot and ſent forth as aforeſaid, the aforeſaid Patrick Randall Mc.Donnell in and upon the left breaſt of him the ſaid Patrick Randall Mc.Donnell then and there with the leaden bullet aforeſaid out of the piſtol aforeſaid, by the ſaid Andrew Craig as aforeſaid ſhot, diſcharged and ſent forth wil-

wilfully, traitorouſly and of his malice prepenſed, did ſtrike, penetrate and wound, giving to the ſaid Patrick Randall Mc.Donnell then and there with the leaden bullet aforeſaid ſo as aforeſaid ſhot, diſcharged and ſent forth out of the piſtol aforeſaid by the ſaid Andrew Craig, in and upon the ſaid left breaſt of him the ſaid Patrick Randall Mc.Donnell one mortal wound of the depth of four inches, and of the breadth of half an inch, of which ſaid mortal wound the aforeſaid Patrick Randall Mc.Donnell then and there inſtantly died; and that the aforeſaid George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy Law, John Huſton, James Foy, otherwiſe Sladeen, William Fulton, Samuel Stephenſon, John Mc.Mullen, William Kelly, Patrick Dorning, William Logan, Robert Logan, William Fulton, Wallace Kelly, James Mc.Cullagh, John Chambers, John Chapman, Archibald Newen, and John Bernee, then and there wilfully, traitorouſly, and of their malice prepenſed, were preſent, aiding, helping, abetting, comforting, aſſiſting and maintaining the ſaid Andrew Craig in the treaſon and murder aforeſaid, in manner and form aforeſaid to do and commit. And ſo the Jurors aforeſaid do ſay, that the ſaid Andrew Craig, George Robert Fitzgerald, Timothy Brecknock, James Foy, John Fulton, Charles King, John King, Abel Fulton, John Murphy, James Maſterſon, John Cox, David Saltry, Philip Cox, Richy Law, John Huſton, James Foy, otherwiſe Sladeen, William Fulton, Samuel Stephenſon, John Mc.Mullen, William Kelly, Patrick Dorning, William Logan, Robert Logan, William Fulton, John Chambers, John Chapman, Archi-

bald Newen, and John Bernee, the ſaid Patrick Randall Mc.Donnell, then and there in manner and form aforeſaid, wilfully, traitorouſly, and of their malice prepenſed, did ſlee and murder, againſt the peace of our ſaid lord the king, his crown and dignity, and alſo againſt the form of the ſtatute in ſuch caſe made and provided.

When Mr. Brecknock was called to plead, he ſaid there did not appear to be any *conſtat* of a true bill againſt him; that in that caſe the preſumption of law was, that the bill was *ignored*; and claimed as his right to have a ſight of the true bill.

The *Chief Baron* directed the Clerk of the Crown to go on with his duty; and the bill ending, "againſt the form of the ſtatute," Mr. Brecknock aſked what ſtatute? To which the Court anſwered, that he was now premature.

When the queſtion, "how will you be tried," was put to him, and the Clerk of the Crown deſired him, as uſual, to anſwer, "by God and my Country," Mr. Brecknock ſaid, I ſhould chooſe to be tried by God, and not by *your* Country. After being repeatedly urged to plead in the common form,

The *Chief Baron* informed him, that if he did not anſwer in the manner preſcribed, he muſt proceed according to law, which would be to conſider him as *mute*, and paſs ſentence upon him.

Mr. Brecknock ſaid it was impoſſible to be tried both by *God* and the *Country*, they were diſtinct propoſitions. But being again urged by the *Chief Baron*, he made the uſual anſwer, and then they all ſeverally pleaded, Not Guilty, to both indictments.

George

George Robert Fitzgerald and Timothy Brecknock were then arraigned on the following indictment:

County of Mayo, } THE Jurors of our Lord the
to wit. } King upon their oath preſent and ſay, That George Robert Fitzgerald, late of Rockfield, in the county of Mayo, Eſq; and Timothy Brecknock, late of the ſame, Gent. not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the Devil, on the 21ſt day of February, in the 26th year of the reign of our Sovereign Lord George the Third now King of Great Britain, France, and Ireland, defender of the faith, and ſo forth, at Rockfield aforeſaid, in the ſaid county of Mayo, did of their malice prepenſed, wilfully, traitorouſly, and felonioufly provoke, ſtir up, and procure Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, to ſlee and murder one Patrick Randall Mc.Donnell, who was then and there a ſubject of our ſaid Lord the King, within this land of Ireland.

And the Jurors aforeſaid, upon their oath aforeſaid, further preſent and ſay, that the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William

William Robinſon, John Cox, Philip Cox, James Maſterſon, Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, on the day aforeſaid, in the year aforeſaid, with force and arms, to wit, at Kilnecarra in the county aforeſaid, in and upon the ſaid Patrick Randall Mc.Donnell, in the peace of God, and of our ſaid Lord the King, then and there being wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did make an aſſault, and certain guns of the value of 5*s*. each and every of the ſaid guns, being then and there charged with gunpowder and a leaden bullet, which guns they the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in their right hands reſpectively, then and there had and held againſt and upon the ſaid Patrick Randall Mc.Donnell, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up and procurement of the ſaid George Robert Fitzgerald, and Timothy Brecknock, did ſhoot and diſcharge, and the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, with the leaden bullets aforeſaid out of the guns aforeſaid, then and there by force of the gun-

gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid Patrick Randall Mc.Donnell wilfully, traitorouſly, and felonioufly and of there malice prepenſed, and by the aforeſaid provocation, ſtirring up and procurement of the ſaid George Robert Fitzgerald, and Timothy Brecknock, then and there did ſtrike, penetrate, and wound, giving to the ſaid Patrick Randall Mc. Donnell, then and there with the leaden bullets aforeſaid, ſo as aforeſaid, ſhot, diſcharged, and ſent forth out of the guns aforeſaid by the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in and upon the body of him the ſaid Patrick Randall Mc.Donnell, ſeveral mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforeſaid Patrick Randall Mc.Donnell then and there inſtantly died.

And the Jurors aforeſaid, upon their oath aforeſaid, do ſay, that Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, the ſaid Patrick Randall Mc.Donnell, then and there in manner and form aforeſaid, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did ſlee and murder.

And

And ſo the Jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid George Robert Fitzgerald, and Timothy Brecknock, then and there in manner and form aforeſaid, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did provoke, ſtir up, and procure the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent to the Jurors aforeſaid unknown, to ſlee and murder in manner and form aforeſaid, the ſaid Patrick Randall Mc.Donnell, then and there being a ſubject of our ſaid Lord the King, within this land of Ireland, contrary to the peace of our ſaid Lord the King, his crown and dignity, and againſt the form of the ſtatute in that caſe made and provided.

Mr. *Stanley* requeſted the former indictment to be read, as the charge now made, ſeemed to him to be for the ſame crime laid in the former indictment, and bid Mr. Fitzgerald not plead.

The *Chief Baron* then deſired Mr. Stanley to *plead* or *demur*; and

The *Attorney General* aſked him, did he chooſe to demur to the indictment? if he did, he would join him in the *demurrer inſtanter*.

Mr. *Stanley* then ſaid, that in his opinion the preſent indictment was ſubſtantially for the ſame fact laid in the former indictment, to which Mr. Fitzgerald had pleaded not guilty, and ſaid he thought it

it very hard, he ſhould now be forced to plead not guilty to the ſecond indictment; for if he ſhould be acquitted on the firſt indictment, and that he ſhould be adviſed to plead *auterfois acquit* to the ſecond, he might be then told he came too late with that plea, having already pleaded the general iſſue not guilty, and as it had been determined in the caſe of the King againſt Swan and Jefferys in Forſter, that *auterfois arraign* was no plea. He did not ſee any poſſible way for the priſoner to take advantage of the objection now, but by way of demurrer.—However upon conſideration and conſultation, he gave it up, and adviſed Mr. Fitzgerald to plead, which he did, as did Mr. Brecknock.

They were then alſo arraigned on the following indictment:

County of Mayo, } THE Jurors of our Lord the
to wit } King upon their oath preſent and ſay, That George Robert Fitzgerald, late of Rockfield, in the county of Mayo, Eſq; and Timothy Brecknock, late of the ſame, Gent. not having the fear of God before their eyes, but being moved and ſeduced by the inſtigation of the Devil, on the 21ſt day of February, in the 26th year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France, and Ireland, defender of the faith, and ſo forth, at Rockfield aforeſaid, in the ſaid county of Mayo, did of their malice prepenſed, wilfully, traitorouſly, and felonioufly provoke, ſtir up, and procure Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John

 Burney,

Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, to ſlee and murder one Charles Hipſon, who was then and there a ſubject of our ſaid Lord the King, within this land of Ireland.

And the Jurors aforeſaid, upon their oath aforeſaid, further preſent and ſay, that the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, Patrick Dorning, otherwiſe Downey, and divers other perſons, at preſent to the Jurors aforeſaid unknown, on the day aforeſaid, in the year aforeſaid, with force and arms, to wit, at Gurtnefulla, in the county aforeſaid, in and upon the ſaid Charles Hipſon, in the peace of God, and of our ſaid Lord the King, then and there being wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did make an aſſault, and certain guns of the value of 5s. each and every of the ſaid guns, being then and there charged with gunpowder and leaden bullets, which guns they the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in their right hands reſpectively, then and there had and held againſt and upon the ſaid Charles Hipſon, wilfully,

traitor-

traitorouſly, and felonioufly, and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up and procurement of the ſaid George Robert Fitzgerald and Timothy Brecknock, did ſhoot and diſcharge, and the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, with the leaden bullets aforeſaid out of the guns aforeſaid, then and there by force of the gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid Charles Hipſon, wilfully, traitorouſly, and felonioufly and of their malice prepenſed, and by the aforeſaid provocation, ſtirring up and procurement of the ſaid George Robert Fitzgerald and Timothy Brecknock, then and there did ſtrike, penetrate, and wound, giving to the ſaid Charles Hipſon, then and there with the leaden bullets aforeſaid, ſo as aforeſaid, ſhot, diſcharged, and ſent forth out of the guns aforeſaid by the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, in and upon the body of him the ſaid Charles Hipſon, ſeveral mortal wounds of the depth of four inches, and of the breadth of half an inch, and of which mortal wounds the aforeſaid Charles Hipſon then and there inſtantly died.

And the Jurors aforeſaid, upon their oath aforeſaid, do ſay, that Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, the ſaid Charles Hipſon, then and there in manner and form aforeſaid, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did ſlee and murder.

And ſo the Jurors aforeſaid, upon their oath aforeſaid, do ſay, that the ſaid George Robert Fitzgerald, and Timothy Brecknock then and there in manner and form aforeſaid, wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did provoke, ſtir up, and procure the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Slateen, Humphrey George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Brewing, John Chapman, John Rahenny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent to the Jurors aforeſaid unknown, to ſlee and murder in manner and form aforeſaid, the ſaid Charles Hipſon, then and there being a ſubject of our ſaid Lord the King, within this land of Ireland, contrary to the peace of our ſaid Lord the King, his crown and dignity, and againſt the form of the ſtatute in that caſe made and provided.

Mr

Mr. *Stanley* then moved to put off the trial, and produced an affidavit of Mr. Fitzgerald's for the purpoſe of poſtponing his trial; which from inability was ſigned with his mark. It ſtated Mr. Fitzgerald's having been arreſted on the 21ſt February, his tenantry baniſhed, and his being himſelf attacked in priſon; it alſo ſtated the abſence of four material witneſſes, which were ſprited away by the proſecutor, and the temper of the county, which rendered it impoſſible, with ſafety to his life, to abide his trial until the next aſſizes.

The *Attorney General* then moved, that two affidavits which he held in his hand might be read; which was ordered.—They were the affidavit of Andrew Edmondſon, which proved notice of trial being ſerved on Mr. Fitzgerald; the other was the affidavit of Patrick Clarke, Sub-ſheriff of the county, the purport of which was, that Mr. Fitzgerald, on the night of the day on which he was committed, had told him that he ſhould be properly rewarded if he would let him eſcape.

The *Attorney General* ſaid it was not his deſire to preſs on the trial, but he wiſhed to inform him, Mr. Fitzgerald, that his trial would certainly come on long before the next aſſizes.

The *Chief Baron* ſaid, from the ſtate in which he ſaw Mr. Fitzgerald, he had a judicial knowledge of his ſituation, and in a ſtate, he thought a man of ſo much conſequence ought to be perfectly at eaſe; the irons are to be ſtricken off from a priſoner who is to be tried—Why? that he may be in full poſſeſſion of himſelf. Another part of his affidavit he feared was but too true, that the county was not in ſuch a temper as to be fit for his trial!—Human nature will be human nature ſtill; and

and where *crimes* like theſe are perpetrated, it is impoſſible not to feel reſentment—And he was fortified in his opinion when he conſidered that the priſoner, even when in a gaol, in the cuſtody of the law, was not ſecure from violence—but he thought it very right in the Attorney General to acquaint Mr. Fitzgerald, that he muſt be ſpeedily tried; the public tranquility could not remain diſturbed, and it was probable that he and Mr. Baron Power would return in the next vacation to try Mr. Fitzgerald. He thought it alſo neceſſary to ſay, that the trial was poſtponed on accouut of the ill ſtate of the priſoner's health and his affidavit of it, which kind of affidavits he knew ought always to be ſparingly received. The trial, he was therefore of opinion, ought now to be put off.

The *Attorney General* declared, that government had ordered him to proſecute the gentlemen who had wounded Mr. Fitzgerald in priſon, with the ſame *rigour* as he was directed to proſecute Mr. Fitzgerald himſelf.

The Court then adjourned for half an hour, to let Mr. Fitzgerald be carried out.

As ſoon as the Court was opened again, Mr. Brecknock claimed it as his right, as an Engliſhman, to have a jury of *medietas linguæ*.

The *Chief Baron* informed him that whenever he was tried he would be tried according to law.

Andrew Gallagher, John Gallagher, James Martin, Luke Higgins, Charles Higgins and Edward Martin were then brought up and arraigned on the following indictment:

County

County of Mayo, to wit. } THE Jurors of our Lord the King upon their oath preſent, That Andrew Gallagher, of Caſtlebar, apothecary, John Gallagher, coroner, James Martin, doctor of phyſic, Luke Higgins, of Caſtlebar, tanner, Charles Higgins, of Weſtport, gentleman, and Edward Martin, of Caſtlebar, gentleman, with divers other perſons, to the Jurors aforeſaid at preſent unkown, being ill deſigning and diſorderly perſons, of a wicked and malicious diſpoſition, and not regarding the laws and ſtatutes of this realm, nor the pains and penalties therein contained, after the 24th day of June, in the year of our Lord 1778, to wit, on the 21ſt day of February, in the 26th year of the reign of our Sovereign Lord George the Third, now king of Great-Britain, France and Ireland, and ſo forth, with force and arms, at Caſtlebar, in the county aforeſaid, with certain piſtols loaden with gun-powder and a leaden bullet, which they the ſaid Andrew Gallagher, John Gallagher, James Martin, Luke Higgins, Charles Higgins, and Edward Martin, with divers other perſons, and each and every of them in both their and in each and every of their hands then and there had and held, they the ſaid Andrew Gallagher, John Gallagher, James Martin, Luke Higgins, Charles Higgins, and Edward Martin, with divers other perſons, and each and every of them with the ſaid piſtols being ſo loaded as aforeſaid, did then and there wilfully, wantonly and maliciouſly wound George Robert Fitzgerald, the ſaid George Robert Fitzgerald being then a priſoner in the gaol of Caſtlebar aforeſaid, by force of the gun-powder and leaden bullet ſhot out and diſcharged from the ſaid piſtol, with intent in ſo doing, him the ſaid George Robert Fitzgerald to murder, againſt the form of the ſtatute in that caſe made

made and provided, and againſt the peace of our ſaid Lord the King, his crown and dignity.

They were alſo arraigned on the following indictment:

County of Mayo, to wit. } THE Jurors for our Lord the King upon their oaths preſent, That Andrew Gallagher, of Caſtlebar, apothecary, John Gallagher, of Caſtlebar, one of the coroners of our Lord the King, James Martin, of Caſtlebar, doctor of phyſic, Luke Higgins, of Caſtlebar, tanner, Charles Higgins, of Weſtport, gentleman, Edward Martin, of Caſtlebar, gentleman, and Daniel Clarke, of Caſtlebar, yeoman, with divers other perſons, to the Jurors aforeſaid at preſent unknown, on the 21ſt day of February, in the 26th year of the reign of our Sovereign Lord George the Third, now king of Great Britain, France and Ireland, defender of the faith, and ſo forth, with force and arms, at Caſtlebar, in the county aforeſaid in and upon George Robert Fitzgerald, late of Rockfield, Eſq; in the peace of God and our ſaid Lord the King then and there being, did make an aſſault, and him the ſaid George Robert Fitzgerald then and there did beat, wound and ill treat, ſo that his life was greatly deſpaired of, and other wrongs to the ſaid George Robert Fitzgerald then and there, did to the great damage of the ſaid George Robert Fitzgerald, and againſt the peace of our ſaid Lord the King, his crown and dignity.

To theſe indictments they ſeverally, except Edward Martin, pleaded, Not Guilty; and on a motion of Mr. Browne, of their counſel, and upon the Court's having inſpected the informations, and his

his Majeſty's Attorney General having conſented thereto, Andrew Gallagher, John Gallagher, James Martin, Luke Higgins and Charles Higgins, were admitted to bail, upon being bound themſelves in a recognizance for 500*l.* each, with two ſecurities for 250*l.* each; and Daniel Clarke in a recognizance of 40*l.* with two ſecurities of 20*l.* each.

At the cloſe of the ordinary buſineſs of the county, the Court adjourned over the aſſizes to the 7th of June, being in the interval between Eaſter and Trinity Term.

WEDNESDAY, JULY 7, 1786.

THIS day the Lord Chief Baron and Mr. Baron Power opened the court, purſuant to adjournment. The Grand Jury were called over, and the Sheriff was directed to inform ſuch of them as had abſented themſelves, that they would be, on the morrow, called upon a very heavy fine.——The Court were alſo pleaſed to order the Sheriff to have the Grand Pannel of his county ſummoned to attend on the Petit Jury; and that Mr. Fitzgerald and the other perſons accuſed ſhould be brought up early the next day.

Adjourned to ten o'clock on Thurſday morning.

THURSDAY, JUNE 8, 1786.

THE Court having met, purſuant to adjournment, Mr. *Calbeck* ſaid, that as the dock ſeemed very much crowded he hoped their Lordſhips, before

 they

they proceeded to buſineſs, would conſider the ſtate of illneſs under which Mr. Fitzgerald laboured, and permit him to come forward, and have a place at the table, where he might be at his eaſe.

Mr. *Baron Power*. It is impoſſible. The Court can make no diſtinctions. There is no rank, no condition of men, but when accuſed of ſuch crimes muſt meet with ſimilar treatment. Mr. Fitzgerald muſt remain where he is.

Mr. *Owen*, of counſel for Mr. Fitzgerald, ſaid, that it was only intended to apply to the Court for that indulgence when Mr. Fitzgerald ſhould be called on to give teſtimony on the trial of the ſeveral perſons who had aſſaulted him.

Court. On that occaſion he ſhall have every indulgence. He will give his teſtimony as every other witneſs does, on the table; a chair will be provided for him, and every other thing done to render him as eaſy as poſſible.

The *Court* then called upon Mr. Attorney General to declare which number he meant to proceed in firſt; and he having declared that he intended to proceed firſt as to Mr. Fitzgerald; for if Mr. Fitzgerald ſhould be convicted, he could, before attainder, be uſed as an evidence againſt thoſe perſons who had aſſaulted him in the priſon.

The *Lord Chief Baron* had thought the law to have been ſo at the time Mr. Fitzgerald had been brought up before, but on his reſearches ſince, he had found in Hawkins and the other books which treat on the ſubject, that the law was otherwiſe.

Mr.

Mr. *Attorney General.* Where a conviction is to prevent a witneſs to give teſtimony, the record of his conviction, Hawkins ſays, muſt be ſhewn; and no record can be made up before judgment; and therefore it is intended to be after attainder that a man is rendered incompetent. Conviction before that only goes to his credit.

The *Court* aſked Mr. Calbeck what he ſaid to that?

Mr. *Calbeck,* of counſel for Mr. Fitzgerald, ſaid he was but in one caſe.

Mr. *U. Burke,* of counſel for Mr. Fitzgerald, hoped that the Court would proceed to try the caſe of the firſt enormity the firſt; that they would conſider Mr. Fitzgerald in the cuſtody of the law, within the walls of a priſon when the attack was made upon him. They would alſo conſider the prudence and good ſenſe of proceeding againſt the other perſons firſt, when they remembered that if there be any thing in the objection againſt a witneſs being competent after conviction, that it would operate fatally in that caſe, in as much as Mr. Fitzgerald was the ſolitary witneſs againſt them. So that there muſt be here a failure in juſtice. In the caſe of Mr. Fitzgerald there were many witneſſes, and therefore there could be no ſuch inconvenience.

Mr. *Stanley* inſiſted, that although it was diſcretionary in the Attorney General to conduct the proſecution in ſuch manner as he thought fit, yet the Court ought to take care that the trials ſhould be proceeded on in ſuch manner as might beſt anſwer all the purpoſes of juſtice.——There appeared on their Lordſhips books ſeveral bills of indictment

againſt Mr. Fitzgerald for the murder of Mr. Mc. Donnell and Mr. Hipſon. There alſo appeared a bill of indictment againſt Gallagher, Higgins, and others, for attempting to aſſaſſinate Mr. Fitzgerald, when in gaol and in the cuſtody of the law for that murder. The Court had a right to look into the informations upon which thoſe different bills of indictment were founded, and they would ſee that only one perſon, namely Mr. Fitzgerald, had ſworn any information againſt Gallagher and Higgins for breaking into the goal, and attacking him there. Whereas they would alſo ſee that ſeveral perſons had ſworn informations againſt Mr. Fitzgerald for the murder. Mr. Attorney General had declared that he had received inſtructions from Government to proſecute the perſons who had attacked Mr. Fitzgerald in the gaol, with the ſame rigour that he proſecuted Mr. Fitzgerald himſelf, and yet Mr. Attorney General now wanted to proceed upon the trial of Mr. Fitzgerald firſt; the conſequence of which would be, that if Mr. Fitzgerald was convicted there would be an end of the proſecution againſt the perſons charged with the attack on him in the gaol, as the only witneſs againſt them would be incapacitated from being examined; as it is clearly laid down by Serjeant Hawkins, 2d vol. 432, that "a CONVICTION and a *fertiori* on attainder of treaſon or felony are good exceptions "againſt a witneſs." He truſted however that the Court would hold the ſcales of juſtice equal, and direct the Attorney General to proceed in ſuch manner as might beſt anſwer all the ends of public juſtice. No inconvenience could follow from poſtponing the trial of Mr. Fitzgerald until after the perſons who were charged with attempting to aſſaſſinate him in the gaol were firſt tried. But this great inconvenience and injury to public juſtice

tice might follow, by trying Mr. Fitzgerald firſt; that if he was convicted, the only witneſs for the Crown was rendered incompetent. Beſides that, a falſe prejudice might ariſe in the minds of the public in favour of thoſe gentlemen who were charged with the attack on Mr. Fitzgerald, if his trial and conviction ſhould precede theirs; for though he knew that the guilt or innocence of Mr. Fitzgerald ought to have no influence whatever on the trial of Gallagher and Higgins, yet it was impoſſible to prevent or check the prejudices of human nature.

The *Court* propoſed to Mr. Attorney General to try all the perſons who had broken into the gaol, except Andrew Gallagher.

Mr. *Attorney General.* In truth the ſame reaſons would have operated had not the Court made that kind of propoſal, as to Andrew Gallagher; for had he been convicted, if the doctrine of conviction laid down here be right, he could not have been produced on the trial of Mr. Fitzgerald, and then there was an end of that proſecution. But he felt no difficulty in embracing the propoſal of the Court. Yet he would take upon him to declare that the gentlemen were ignorant of the nature of the proſecution againſt Gallagher and the others, for he had many more witneſſes on his brief than Mr. Fitzgerald: and he alſo once again thought it neceſſary to declare, that he had directions from Government to proſecute theſe gentlemen with the ſame rigour as he ſhould proſecute Mr. Gallagher.

Mr. *Bloſſet*, of counſel for Mr. Gallagher, ſaid he had heard the Attorney General, who had the conduct of Crown-proſecutions, and from what fell from

from him, as to the trying of the priſoners for the aſſault firſt, he thought it neceſſary to obſerve, that there was a wide difference between the nature of their crimes. One was an offence which was not conſidered in ſo high a degree of criminality by the common law, as it now is. A late act of parliament only, had made it capital. The Conſtitution looks, and their Lordſhips would look with a jealous eye upon every invaſion or alteration of the great bulwark of public liberty, the COMMON LAW. Their Lordſhips had the inſpection of the indictments, a benefit to which his clients could not reſort. Perhaps they might be indicted for the higheſt offence under that ſtatute, an *intention* to commit a murder; but what was the other caſe? a *murder* actually committed.

Here the Court interrupted Mr. Bloſſet—and Mr. *Baron Power* ſaid that he hoped counſel would make no compariſon between the nature of the crimes, for if they did the Court muſt, from neceſſity, make ſome obſervations. It was only now neceſſary to ſay, that breaking the gaol was one of the higheſt offences, and only to be conſidered in that light.

Mr. *Bloſſet* was glad he was authorized by the Court to conſider it ſo. His client's caſe was juſt ſo. It was inferior.

The *Court* aſked Mr. Bloſſet if he had any motion to make. The Court had intimated a wiſh to try all the perſons accuſed with the crime of aſſaulting Mr. Fitzgerald firſt. The Attorney General had conſented. What then did Mr. Bloſſet mean?

Mr. *Bloſſet*. The queſtion before the Court was, whether they ſhould try the four gentlemen now at the bar, or Mr. Fitzgerald firſt. The queſtion

was

was alſo, whether they ſhould be tried without Mr. Andrew Gallagher, who was charged with them of the ſame crime, and in the ſame indictment, and was alſo now at the bar. This he contended was a difficulty to Mr. Andrew Gallagher. The evidence againſt them muſt be the ſame. Their defence therefore muſt probably be the ſame, and that defence once known may be rebutted. Nothing but the impoſſibility of getting his client a fair trial otherwiſe could induce him to object, but he thought his defence being known, that would be impoſſible.

The Court over-ruled the motion, obſerving it was the firſt time that an objection had been even made on the defence, that the evidence on the part of the Crown would be diſcloſed.

TRIAL of *John Gallagher*, *James Martin*, *Luke Higgins*, *Charles Higgins*, and *Daniel Clarke*.

THE Clerk of the Crown directed John Gallagher, James Martin, Luke Higgins and Daniel Clarke to look to their challengers; and the Grand Pannel of the county was called over, and the following gentlemen were ſworn of the Petit Jury:

Dominick Geoff. Browne, of Caſtlemagarret, Eſq;
The Honourable John Browne, of Elen-hall, Eſq;
James Browne, of Browne-hall, Eſq;
Peter Lynch, of Caſtlecarra, Eſq;
James Lynch, of Cullen, Eſq;
John Moore, of Ballintaffy, Eſq;
James Gildea, of Croſslough, Eſq;
John Joyce, of Oxford, Eſq;
Edmond Taaffe, of Woodfield, Eſq;
William Ouſley, of Ruſhbrook, Eſq;
Bernard Stewart, of Caſtlebar, Eſq;
Valentine Jordan, of Oldhead, Eſq;

The

The Clerk of the Crown then read a note of the indictment from the crown-book, to the following purport; That they John Gallagher, James Martin, Luke Higgins and Charles Higgins, with others, ſtood indicted, for that they not regarding the laws and ſtatutes of this realm, &c. did with piſtols, ſhoot at, with intent to murder George Robert Fitzgerald, Eſq.

He then read the note of the indictment againſt them for a common aſſault.

Mr. *Bloſſet* objected to their being put upon the two indictments together; and the Attorney General having agreed to put them on both, Mr. Bloſſet again urged, that in the indictment for the ſimple aſſault, it was no matter what intent the aſſault was made with; but was not ſo in the other indictment. He hoped therefore, if the Court ſhould inſiſt to put them upon their trial for both offences at once, that he might be at liberty to ſpeak to evidence to the common aſſault, provided he in that event ſteered clear of the felonious aſſault. My Lord Coke lays it down expreſsly, that though it was an immemorial uſage not to admit counſel to ſpeak to evidence upon capital criminal charges, yet it was an uſage which had not the ſanction, nor was it warranted by any authority of law.

The Court having given no opinion, Mr. *St. George Daly*, the junior counſel for the Crown, opened the indictment; and the Attorney General ſtated the facts of the caſe; which being recited in the evidence is not here inſerted.

The firſt Witneſs for the Crown was George Robert Fitzgerald, Eſq. *Examined by* Mr. O'Hara.

Previous to his examination, he ſaid that it was extremely

extremely diſagreeable to him, to give evidence at all.—He had, however, rather ſtate the facts himſelf, than follow the examination of counſel. Mr. *O'Hara* obſerved, that in examining him he ſhould follow the order which appeared in his own information; he alſo warned him not to ſtate any thing which related to Andrew Gallagher, who was not then upon his trial. Mr. *Fitzgerald* then ſaid, that as to Andrew Gallagher, he had but one thing to ſay, and that was to his credit. —He then proceeded to give his teſtimony, which was, that on the 21ſt of February laſt, his houſe was broke open, and ſome time afterwards, he was told that he was arreſted—he was taken by a great number—a mob.—He requeſted to be put in the hands of the Sheriff, and he was ſo.—Mr. John Gallagher, the priſoner at the bar, was one of the mob who had taken him.——The taking was accompanied with circumſtances of great violence; his houſe was broke open, and ſeveral ſhots were fired. He was put into the gaol on the 21ſt of February. When he was put into the gaol, he was taken into the room which is called the Marſhalſea. There were two centinels put upon him, as a guard—The corporal deſired them to load, and fire on any perſon who might break in.—He was told afterwards, dinner was ready for him below ſtairs—he could not exactly ſay when he was told ſo, nor did he exactly recollect who called him to dinner.—He did not go down directly, becauſe the centinel would not permit him, until the corporal came and relieved the guard. So ſoon as he was permitted, he went down. The doors of the room where he had been at dinner were broken in—there was a previous circumſtance thereto. Some time after he

came down, the Sub-ſheriff came in.—He informed the witneſs that the gaoler had been juſt then changed—that he had buſineſs to go up into the Marſhalſea, and muſt take one of the centinels with him. He, without conſulting the corporal, took one of the centinels up ſtairs and left one.—Soon after, a number of people forced open the door—it was not long after—it was while the Sub-ſheriff was above ſtairs.—The door was ſhut when they forced it open, and he believes the perſons who broke open the door entered.

[Here the witneſs looked at the bar.]

He ſaw four of them at the bar, one of them commonly goes by the name of Doctor Martin. He was told his name was James, but does not know.—Another of them, Mr. Charles Higgins, believes he lives at Weſtport.—Another of them, Mr. John Gallagher, and the other Mr. Luke Higgins—He was not certain whether they were the perſons who forced the door of the gaol, but they came in. *He would not take upon him to ſay whether Daniel Clarke was there*—A good many others entered beſides the perſons at the bar—they were armed—he recollected ſome of the arms—they were piſtols and ſword canes, and afterwards a firelock. Doctor Martin had a piſtol and a ſword cane, but till the piſtols were fired the ſword canes were not made uſe of. There were a great many had ſword canes. Mr. John Gallagher had a piſtol, but the witneſs did not perceive that he had any ſword cane.—He could not tell who firſt aſſaulted him, or the manner of the aſſault. John Gallagher collared him—and ſeveral piſtols were fired at him—The others had piſtols.—He could not ſay how many fired at him; there were marks of ſhots in

the

the wall, and it appeared that there were five marks, one of which was charged with ſwan ſhot and a ball. There was a ball in his thigh which was not yet extracted. While John Gallagher collared him there was a ſixth ſhot fired at his head, which he perceived—he put up his hand to change the direction, and it broke the ring on his finger. The party began to thruſt at him—He ſtruggled with John Gallagher, and got looſe from him. So ſoon as they had fired at him, they thruſt at him with ſword canes—One he particularly was certain thruſt at him, it was Doctor Martin——the thruſt was in a very particular manner, which he would mention. As he made the thruſt, the witneſs got the middle finger of his right hand round the ſword, in order to direct it from his body, and it ran up into his arm and there broke.—— It was impoſſible for him to ſay how many wounds he got then, or before, or after he got looſe from John Gallagher—but he got a great many—One circumſtance particularly he recollected of Doctor Martin—he was poking at him from behind, and finding that the point did not enter the witneſs's coat, he ſhortened his grip, and tried to bore it through his coat without effect.—After he got free from Gallagher they ſtill continued poking at him. There were one or two lights in the room—he was not poſitive which—they were extinguiſhed at laſt —it was impoſſible for him to tell by whom, but he recollects that the candle was given to a boy to hold by one of the party, and that the man who gave it to him ſtruck the witneſs with the candleſtick. [Here the witneſs ſhewed the mark of a wound on his head.] When the candle was put out, they ſeemed in a great hurry to get out—the ſtroke of the candleſtick was not the laſt injury he received—the firelock had been before taken from

the centinel during the attack, whether forced from him or not he did not know, but he knew that the centinel gave him no aſſiſtance—one of the party ſtood at the door with the firelock—he afterwards held it by the extremity and ſtruck the witneſs with the but end of it on the head until he ſtruck him under the table—they continued beating at him with the but end of their piſtols and the muſket for ſome time—almoſt all the ſword-canes had been broken—every one of the party ſtruck him—he could not tell how many wounds he had received—when they had ſtruck him under the table, he begged of them to deſiſt for they had done what they wanted; they had done his buſineſs, for he ſuppoſed their purpoſe was to diſpatch him; on which, John Gallagher ſwore a violent oath, that he believed his buſineſs was done, but if it was not they would return on the morrow and hang him, and he, Gallagher, would dance on his the witneſs's ſhoulders.——In their ſtriking of him he put up his hands to ſave his head, and received ſeveral ſtrokes on his hand, and one of the bones of one of his fingers in the back part of his hand was broken, ſo as that he had loſt the uſe of it.

He was croſs examined by Mr. Bloſſet.

A few days after the affray, a magiſtrate had been with him—It was Mr. John Browne, one of the jury. He aſked ſome queſtions, but not poſitive what they were. He was not ſure whether he had ſworn any informations; but he rather inclined to think he had—Does not recollect whether he had the informations ready written, or whether Mr. Browne took them down—he was not in a ſituation to have a perfect recollection—Mr. Browne

Browne would beſt recollect—he could not recollect any part of the information, but he knew that the name of Clarke was mentioned. He recollected ſwearing other informations before another magiſtrate; but before whom he did not recollect—he could not ſay at what diſtance of time he had ſwore them, but it was at a conſiderable time after.—He could not recollect any firelock but the one in the centinel's hand, from the crowd about him. He was in that ſituation to be incapable of obſerving whether the centinel returned or not.—*There was not one ſhot fired* before the party ruſhed in, as he recollects—he was told that one ſhot was fired by the centinel above ſtairs, to alarm the garriſon and the town—he could not tell whether to believe that report or not—he heard it from perſons, of whom he could not tell, whether they were indifferent to the event or not—circumſtances might alter men's diſpoſitions—He was obliged to Mr. Bloſſett for putting him in mind of one circumſtance—there was a bayonet on the end of the muſket, and he felt the effect of it—one of his teeth was ſtruck out by a ſtroke from it—another of them was broken, and he believed its being broken hindered the bayonet from going down his throat—he could not tell whether it was diſcharged or not—he believed it was—It would have been fortunate for him if the candle had been put out ſooner, for they might have hurt themſelves—he could not aſcertain the number who had come into the room, but it was crouded near where he ſtood—the party was in motion about him, and very active—he could not ſay whether ſeveral perſons during the affray paſſed between him and the candle—they did not come into the priſon to hurt each other, they came there to hurt him—he dared to ſay, they did not come to hurt each other, for

if

if they had that intention they could find each other out of doors—John Gallagher held him—He ran no hazard by doing ſo unleſs in the confuſion.—The witneſs had been robbed before he got into priſon of his ſhoe-buckles—*he had nothing of value about him but two guineas, which happened to be in his fob—he had no watch or ring* but that which was broken—he recollects being robbed when he was taken at Turlogh—*the two guineas in his fob were ſafe*—When he was robbed at Turlogh his purſe might have contained more than 25 guineas—but he had no purſe in the priſon, nor any watch.

Second witneſs, Mr. Patrick Clarke, *examined by* Mr. Paterſon.

He is Sub-ſheriff of the county of Mayo—he was in his gaol on the night of the 21ſt of February about eleven o'clock—he recollected that ſome perſons had forced into the gaol, and had committed violence firſt upon himſelf, and afterwards on Mr. Fitzgerald—the witneſs found Mr. Fitzgerald, when he went into his apartment, wounded and very ill treated—he could not take upon him to name any of the perſons who broke in—he did not know any of the priſoners to be any part of the party—he was pulled down—he made a violent outcry and called out murder—he was aſſiſted by Mr. Elliſon, who brought a guard—he was coming out of Mr. Fitzgerald's apartment when he was ſeized—*the candle was inſtantly put out*—one of the ſhots, he believed, was fired at himſelf—it was impoſſible for him to tell who had fired the ſhot—it was fired at ſome diſtance and in the dark.

He

He was croſs examined by Mr. Browne.

He ſaw Charles Higgins upon that night—he had taken him with him to the gaol, as a friend and witneſs to his indenting the new gaoler.—— Charles Higgins was with him when he was attacked; he, Higgins, had no weapon, and he believed that he could have no weapon without the witneſs's knowledge.

The Court here took up the witneſs. He for ſome time did not know what became of Charles Higgins—indeed for ſome time he did not know what became of himſelf—he ſuppoſes he made the beſt of his eſcape.

Here the Court examined Mr. *Fitzgerald* again—he recollected that Clarke, the Sub-ſheriff, and Charles Higgins were in his room that night previous to the outrage.

Third witneſs, Robert McBeth, *examined by* Mr. Daly.

He was centinel in the priſon of Caſtlebar on the 21ſt of February—he was fixed at 7 o'clock, and ſtaid till between ten and eleven. A little after ten, or between ten and eleven, a parcel of men ruſhed into the priſon—the firſt man ruſhed up furiouſly at Mr. Fitzgerald—the witneſs aſked him was he going to murder the man—He then received a ſtroke from behind, which knocked him upon a chair—ſo ſoon as he began to recover himſelf, he perceived ſeveral ſhots fired, ſhot after ſhot, and on firing the ſhots the candle was extinguiſhed—he could deſcribe the perſon who firſt forced in, but he did not know him—he was a tall man,

man, taller than the witneſs—he wore white clothes—he could not diſtinguiſh any perſon in the dock who was concerned in abuſing Mr. Fitzgerald. *The candle was immediately put out*, and the affray laſted for four or five minutes.

The fourth witneſs, George Daniel, Eſq; *examined by* Mr. Attorney General.

He knows the priſoners—he lent Mr. Luke Higgins a caſe of piſtols on the morning of the 21ſt of February—he found one of them in the gaol of Caſtlebar between the hours of 9 and 10 on the night of that day after the aſſault on Mr. Fitzgerald—he found the piſtol in the centinel's hand, he believed in McBeth's.

Here *McBeth* was called again and proved that he found the piſtol, which he had given to Mr. Daniel, on the floor of Mr. Fitzgerald's apartment in the priſon.

Mr. Daniel *was croſs examined by* Mr. James D'Arcy.

He could not tell for what purpoſe the piſtols were borrowed by Mr. Higgins; they were borrowed the day that the inhabitants went to Turlogh—he ſaw Mr. Higgins on horſeback there—he believed they might have been borrowed for the purpoſe of going with the other gentlemen to apprehend whoever committed the outrage—he found the piſtol charged the next morning after he had gotten it from McBeth, and it had never been out of his cuſtody—he was hurt at finding his piſtol in Mr. Fitzgerald's apartment—on the third time of ſending for his piſtols, the other piſtol was reſtored—

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the firſt and ſecond time of his ſending, the meſſenger informed him that Mr. Higgins was out of town—When he met Mr. Higgins, he informed the witneſs that the piſtols had been taken out without his knowledge.

On a queſtion being put to him by the Court on the ſuggeſtion of Mr. U. Burke; he anſwered, that he found no body in the gaol, but Mr. Fitzgerald in the way which had been deſcribed, and a woman ſupporting him; nor did he ſee any perſon coming out of the gaol.

The fifth witneſs, the Honourable George Pomeroy, *examined by* Mr. O'Hara.

He went to the gaol on Tueſday the 21ſt of February, after the outrage—He ſaw no perſon coming out of the gaol, nor at or near the gaol.

The ſixth witneſs, Pomeroy D'Arcy, Eſq; *examined by* Mr. Daly.

He knew the gentlemen at the bar—all he knew of the attack on Mr. Fitzgerald was, that on the night of that affair he had ſpent the evening abroad; at about 10 o'clock, he met Mr. John Gallagher, Mr. Edward Martin, and a third perſon whom he did not know—there was no converſation between him and Mr. Gallagher—he met them at the end of the ſeſſion-houſe—Mr. Gallagher had no arms—he thought Mr. Edward Martin had a gun in his hands—there were no applications made to him to conceal what had paſſed that night.

Here the proſecution was cloſed, and before the priſoners were called upon their defence, Mr. Fitzgerald was again called on by the Court—He had, he ſaid, already mentioned that he had no

other money in his pocket but the two guineas—he had been rifled before he had left his own place.

The prifoners were then called upon to make their defence, and they accordingly called their

Firft witnefs, John Burke, *who was examined by* Mr. Bloffet.

As he fpoke only the Irifh language, Mr. Peter Smith, one of the affiftants to the Clerk of the Crown was fworn to make true interpretation.

He lived with Andrew Gallagher laft February. His maſter has a houſe in town, and company dined with his maſter at his houſe on the day that Mr. Fitzgerald was hurt—the company was Thomas Gibbons, James Reid, and John Gallagher, his maſter's brother, the coroner—he knew Doctor James Martin—he lived in that town—he lodged in Andrew Gallagher's houſe—he recollected ſeeing Pat. Clarke that night—he came to his maſter's houſe and enquired there for Charles Higgins; the door was ſhut when he came; the witneſs opened it and let him in—Clarke did not tell him what he wanted with him—the witneſs told him that Higgins was above ſtairs in Doctor Martin's room, with the Doctor and Jack Gallagher—this was about ten o'clock at night—the laſt of the people who had dined with his maſter went off—Doctor Martin and Higgins did not go—Clarke went up, and when he went up, went into Doctor Martin's room—Mr. Clarke and Charles Higgins went out together—Andrew Gallagher was then aſleep in his bed—he ſaw Doctor Martin and John Gallagher go into Gallagher's room—Andrew Gallagher was much fatigued when Pat. Clarke came

came—John Gallagher was in Doctor Martin's room; they after went into Andrew Gallagher's room—He knew William Melvin; he saw him that night; he called for his master—the witness told him his master was in the witness's master's room with Doctor Martin—John Gallagher came and desired William Melvin to wait for him and he would be with him just now—the witness heard a noise in the street, and went to enquire what the noise was; he heard a cry of murder, and was told it was George Fitzgerald had escaped out of the gaol—the witness returned to his master's room, and told Doctor Martin, John Gallagher, and his master what he had heard, and that was, that there was murder about the town, for George Fitzgerald had made his escape—Doctor Martin and John Gallagher went out and Melvin went with them—he heard no shots when he left his master's house—he and Melvin thought it a fight, and went to see what the matter was—at that time there was a great crowd about the gaol.

He was cross examined by the Attorney General.

Andrew Gallagher has no other servant in the house but the witness—He has no apprentice—the witness is Andrew Gallagher's only servant—his master, Andrew Gallagher's, house is next door to Moran's the gaoler—he heard a noise, but no shots—there was a riot about the gaol when he went out—Charles Higgins was not with his master.

Second witness in the Defence, William Melvin, *examined by* Mr. Browne.

He was servant to Mr. John Gallagher—he was sent on the night of February 21st to Andrew

Gallagher's houſe for his maſter, by his maſter's ſiſter—he was to ſay a gentleman wanted him—His maſter came out to him there, and bid him wait—ſoon after his maſter came to him, the witneſs heard a noiſe in the ſtreet—the witneſs went to the door, and John Burke (Mr. Andrew Gallagher's ſervant) went out and returned with news that Fitzgerald had eſcaped—The witneſs and John Burke went to Mr. Andrew Gallagher's bed-chamber—they found Andrew Gallagher there—he was ill in bed—his maſter (John Gallagher) and Doctor Martin were in the room—Doctor Martin and John Gallagher went out together; the witneſs and John Gallagher went on to the gaol, where Fitzgerald's wounds were then dreſſing by Doctor Lindſay.

He was croſs examined by Mr. O'Hara.

His maſter or he did not ſpeak to any perſon on their road home.

Here Pomeroy D'Arcy, Eſq; *was called again, and examined by the Court.*

He did not ſpeak to Mr. Gallagher when he ſaw him the night of the outrage.—The outrage was committed before he had met him and the other men.

Third Witneſs in the Defence, George Smyth, *examined by* Mr. D'Arcy.

On the night of the affray in the gaol, he went with Mr. Luke Higgins to Mr. Thompſon's—he is an outſide ſervant to Mr. Luke Higgins—Doctor Swaile, John Nolan, Doctor Martin and Charles Higgins, had dined with his maſter that day—his maſter

maſter lives in the houſe with Doctor Boyde—The company broke up between nine and ten—Mr. Luke Higgins delayed for half an hour, until he put up the remnants of all the liquors which had been laid out for dinner.—Mr. Luke Higgins called for John his ſervant, and was anſwered that John was gone to the ſtable—he then ordered the witneſs to get a lanthorn and light him up ſtreet—the witneſs did ſo, and lighted him up to Mr. Thompſon's—Mr. Higgins went in there, and deſired the witneſs to wait—Thady Corcoran came to Mr. Thompſon's, and aſked for Mr. Higgins—the witneſs ſent in for his maſter by one of Mr. Thompſon's ſervants—when he came out, Corcoran told him, that Mr. Fitzgerald was making his eſcape; that there was a great riot and firing in the gaol—Mr. Higgins then ſaid to Corcoran, that he, Higgins, could not help that—that was no place for Corcoran to be in, and deſired him to go home—his maſter went home from Thompſon's, and did not go near the gaol.

He was croſs examined by Mr. Paterſon.

His maſter would not let the witneſs make up his horſes—the horſes were always in town, and the witneſs never made them up—Thady Corcoran is one of Mr. Higgins's tanners—He ſent in by a ſervant for his maſter at Mr. Thompſon's, and did not go in himſelf.—Mr. Thompſon's houſe is oppoſite to Mrs. Petche's, and is oppoſite to the gaol—it is at the corner of the lane leading to the caſtle; there was no alarm in the place where the witneſs was, until Corcoran came—if there were any the witneſs himſelf muſt have heard it—Doctor Martin, Charles Higgins, Doctor Swayle and Mr. John Nolan, had dined with his maſter—Mr. Charles Higgins did not ſup at Mr. Thompſon's as he be-

believes. Moran's houſe is the only houſe between Andrew Gallagher's houſe and the court houſe—the gaol is underthe court houſe—He heard no riot when he was going home.

Fourth Witneſs in the Defence, Thady Corcoran, *examined by* Mr. Bloſſet.

The witneſs is a tanner—he tans for Mr. Luke Higgins—he did ſo on the 21ſt of February laſt—he knew the laſt witneſs, George Smyth, who is a ſervant to Mr. Luke Higgins—he ſaw Mr. Luke Higgins and Smyth going into Mr. Thompſon's on the night of the riot in the gaol—the night was very dark, but he ſaw them very plainly, for his maſter had George Smyth with him, and Smyth carried a lanthorn—after his maſter went into Thompſon's, he heard a noiſe in the gaol, and ſeveral ſhots firing—the witneſs was in John Barret's houſe, in the lane where the gaol is—John Barret's houſe is *fornent* the gaol—when he heard it, he went to Mr. Thompſon's to let Mr. Higgins know, that the report in town was, that Mr. Fitzgerald was making his eſcape—the reaſon why he went to tell his maſter of this report was, becauſe his maſter was a friend to Mr. Mc. Donnell—he ſaw his maſter at Mr. Thompſon's, but he firſt ſaw George Smyth—he told his maſter that he ſuppoſed Mr. Fitzgerald was trying to make his eſcape, and his maſter ſaid he could not help it, if he did make his eſcape—he bid the witneſs to go home; and the reaſon why he bid him go home, was that he might be early at his work.

Here he was croſs examined by Mr. Daly.

His work is uſually done at about ſeven o'clock—he generally goes to bed at eleven; he was up that

that night at eleven—He never tried what time would ſerve him for ſleep, but he believed that he could do with an hour's ſleep, if it were neceſſary.—George Smyth is an out ſervant to Mr. Higgins—he is his ſteward—he attends his houſe and gardens, and ſome times takes care of his horſes—the witneſs would venture on his oath to declare that George Smyth did not take care of his maſter's horſes every day—his maſter has very good horſes that he would not truſt to his care. He believes Mr. Thompſon to be in town.

Anne Chambers was then called on behalf of Daniel Clarke, but not remembering the night of the riot, was not examined.

The *Court* called upon Mr. *Fitzgerald* again, who declared that on the day after the riot he was not perfect maſter of himſelf—he did not recollect whether he at that time charged any perſon with being concerned in the affray, but remembered a converſation in which Clarke's name was mentioned. In his ſecond information he charged more than ſix perſons; he in them charged the four priſoners at the bar, Edward Martin, Andrew Gallagher, and others.

The *Court* then called upon the Hon. *John Browne*, the magiſtrate who took the firſt informations; who was ſworn to give evidence to his fellow jurors.

He went to take the information of Mr. Fitzgerald at the requeſt of Mr. Elliſon, on the next morning after the outrage, at about twelve or one o'clock—he underſtood Mr. Fitzgerald had ſent for him——he (Mr. Fitzgerald) was in his bed—he took his examination from his own mouth, word

word for word, in the preſence of Mr. Elliſon—Mr. Fitzgerald told him, that Doctor Martin and Daniel Clarke were *the only two he knew*; on account of Mr. Fitzgerald's being ill, and ſuppoſing he might be weak in his underſtanding, the witneſs croſs-examined him, and from the very pertinent anſwers he received, was convinced that Mr. Fitzgerald was fully maſter of himſelf—He ſaid *that Clarke was a Wheel-wright or a Coach-maker, of a very tawny complexion, very like an Eaſt-Indian Black.* He never ſaw any man more perfectly collected than Mr. Fitzgerald was at that time—he had doubtleſs ſuffered a good deal from his wounds, but from his conduct and recollection, the witneſs did not think him to be as bad as he pretended to be.

[Here the witneſs was ſhewn the information.]

That was the information he took; the whole of it his own hand writing.

Here the Clerk of the Crown, by order of the Court, read the information as follows:

County of Mayo, to wit. } An Information ſworn before the Honourable John Browne, on Wedneſday the 22d day of February, 1786, ſigned George Robert Fitzgerald, his mark.

THIS Informant being duly ſworn on the Holy Evangeliſts, ſaith, that laſt night, the 21ſt of February, as Informant was ſitting in his room in the gaol of Caſtlebar, *ſome people fired ſeveral ſhots through the door of ſaid room*, and then broke the door open, when James Martin, Eſq; one Clarke, a Wheel-wright or Carpenter, who Informant believes is called Daniel Clarke, came into the room with

with ſeveral other perſons, who attacked Informant with piſtols and a ſword, and therewith wounded Informant in ſeveral parts of his body and head, to the imminent danger of Informant's life.

Mr. *Browne* requeſted the Court to aſk Mr. Elliſon if he did not read that examination three or four times to Mr. Fitzgerald.

The *Court* then called upon the Reverend *Thomas Elliſon*, Clerk, who being ſworn, ſaid,

He was preſent when Mr. Browne received Mr. Fitzgerald's information—Mr. Fitzgerald particularly charged Doctor Martin and Clarke, only, by name—he was aſked if they were the only perſons he knew—his anſwer was, he knew none others. He was very weak and low in body, but perfectly maſter of his ſenſes. The examinations were read more than once to him, Mr. Fitzgerald.

Here Mr. *Browne* ſuggeſted to the Court to aſk Mr. Elliſon, if he recollected that when Brecknock wanted to ſuggeſt ſomething to Mr. Fitzgerald, that he read the examination once again to Mr. Fitzgerald, and would not permit him to ſwear thereto until he heard them read again.

Mr. *Elliſon* did recollect it.—In about a month after the ſwearing the firſt examinations; he could not however be exact as to the time, he took another information by the deſire of Mr. Fitzgerald, in which he charged Doctor Martin, Andrew Gallagher, John Gallagher, Luke Higgins, Charles Higgins, and Edward Martin, with others, with the offence of attacking him in the gaol.——He aſked Mr. Fitzgerald why he had not before made any charge upon them; his anſwer was, that he was not at that time ſufficiently collected to know them all.

The information was here produced to the witneſs—The name Thomas Elliſon, ſubſcribed thereto, was his hand-writing, it was the information which he took from Mr. Fitzgerald.

The *Court* then directed the Clerk of the Crown to read that information alſo, which he did, as follows:

County of Mayo, to wit. } An Information ſworn before the Reverend Thomas Elliſon, on the 17th day of March, 1786, ſigned George Robert Fitzgerald.

THIS Informant being duly examined and ſworn on the Holy Evangeliſts, ſaith, That on Tueſday the 21ſt day of February laſt, John Gallagher, one of the coroners of ſaid county, accompanied by a great number of perſons, came to Examinant's houſe at Turlogh aforeſaid, and after committing great violence, robberies, and outrage in and about ſaid houſe, ſaid Gallagher made a priſoner of this Examinant on an execution or executions, writ or writs, for debt, and brought Examinant in cloſe cuſtody to the town of Caſtlebar, and lodged him in his Majeſty's gaol of ſaid town.—That about the hour of eleven o'clock on the night of ſaid day the following perſons, viz. John Gallagher, one of the coroners of this county, Andrew Gallagher, of the town of Caſtlebar, apothecary, Edmond Martin, of Caſtlebar, James Martin, *M. D.* of the town of Caſtlebar, Charles Higgins, of Weſtport, in ſaid county, Luke Higgins, of Caſtlebar, farmer, and ſome other perſons unknown, with premeditated and intended malice, wantonly, maliciouſly and felonioufly entered the apartment of ſaid gaol where Examinant then was; all armed with a gun, piſtols, ſwords, and other offenſive weapons, and violently attacked

attacked Examinant, fired the ſaid gun, which was loaded with powder and leaden bullets, at Examinant, and alſo fired ſeveral piſtol-ſhots at Examinant, and wounded him in many parts of his head and body.—That ſaid ſeveral perſons treated Examinant in ſo barbarous a manner that his life was deſpaired of.—And ſaith, that from the many and deſperate wounds he then and there received, that Examinant has remained in a languiſhing ſtate, attended by phyſicians and ſurgeons ever ſince.—That by means of ſuch abuſe and languiſhing ſtate, occaſioned thereby, Examinant was unable to give in this his examination ſooner than the preſent time.—And ſaith, he is well convinced, if ſaid ſeveral perſons had not intentionally put out the light or lights then in ſaid apartment, and had not taken for granted that Examinant was dead, they would have continued their ſaid violence and abuſe until they would have actually put Examinant to death.—That when he came to his ſenſes, and was able to examine his pockets, he found that ſaid ſeveral perſons had robbed him of twenty-five guineas and upwards in caſh, together with his watch and ſeals, which Examinant is convinced ſaid ſeveral perſons, or ſome or one of them, ſo felonioufly ſtole and carried away when they left Examinant for dead, in manner aforeſaid.

Here the *Lord Chief Baron* charged the Jury, and ſaid, that they muſt diſmiſs Daniel Clarke from their attention, for though Mr. Fitzgerald had with great accuracy once deſcribed him to Mr. Browne, yet this day when on the table, though he was, as the Jury obſerved, perfectly collected and thoroughly in poſſeſſion of his faculties, he made no charge againſt, nor could he remember him at all. He thought it his duty to ſtate the law as it

ſtood, as to the offence: At common law it was no more than a high miſdemeanour, but by a late act of parliament the legiſlature had made it a capital offence; but in order to ſuſtain the charge laid in the indictment, the ſhooting muſt have been ſuch, that if it had taken effect the homicide, which was the conſequence thereof, would be murder; and there could not be a doubt that if a homicide had taken effect in this caſe, that it would have been a murder; if Mr. Fitzgerald's teſtimony were to obtain credit, and that teſtimony being credited, the intention to commit a murder was clear. The only fact then to be enquired into, to him ſeemed to be, who had perpetrated the fact. For that purpoſe he ſhould ſtate all the evidence, and after having done ſo, make a few obſervations upon it, not at all intending to invade the province of the Jury as to enquiring into all the matters of fact. He then very fully went into all the evidence, and after concluding it, obſerved, that the examinations of Mr. Fitzgerald, and his teſtimony on the table, differed materially as to two circumſtances—the ſhots previous to the entering the gaol, and the robbery on his perſon of 25 guineas. This laſt fact he charges in his information, whereas he had now given evidence on the table that he had only 2 guineas in his fob, which remained after the outrage; and a moſt barbarous outrage it was, let it be perpetrated by whom it might; and he had to lament the melancholy ſtate of a county, where a man, though in the cuſtody of the law, was not protected from the moſt ſavage attacks of inhuman aſſaſſins. There can be no doubt in the mind of any man if a homicide had taken place, that that homicide would have been murder, and he was free to confeſs, that he would have had leſs doubt as to the caſe of the priſoners if they had

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ſet up no defence at all, but reſted on the ſtate of the caſe on behalf of the Crown, and made its weakneſs their ſtrength. What was the defence? *An Alibi*—Certain it is, that this is the beſt kind of defence when it is reſpectably ſupported—but when the nature of the teſtimony given upon this occaſion, and the perſons by whom it was given are conſidered, great doubts muſt ariſe. John Gallagher and Edward Martin were ſeen together by Mr. D'Arcy, at the corner of the priſon—Mr. Daniel found his piſtol in the priſon, and how were theſe circumſtances accounted for; the one by a common ſervant of Mr. Gallagher's, and the other remained unaccounted for at that hour—But ſtill greater doubts muſt be excited from the compariſon of the examinations with the teſtimony given on the table. Mr. Browne had told the Jury, that Mr. Fitzgerald had been perfectly collected when he gave his firſt examination, and Mr. Elliſon had told them, that it was a month after when he gave the ſecond; in the firſt information he charged only two, and knew no more; in the ſecond he charged ſix; in that ſecond, he charged a robbery; on the table he denied being robbed—If then, the Jury thought, that in the firſt information he erred, merely becauſe he was not ſufficiently collected, and did not believe the *alibi* ſet up by the priſoners, they muſt convict them; but, if on the contrary, they did not believe the teſtimony of Mr. Fitzgerald, they ought to acquit them—and if they entertained any doubts—he did not mean light or capricious doubts, but theſe doubts which may be entertained by a prudent, diſcreet, and ſteady man, they ought to incline to the ſide of mercy; and if they thought them guilty of the aſſault, yet not with an intent to murder, they ought to acquit them of the capital

pital offence, and find them guilty on the other indictment only.

The Jury withdrew for a quarter of an hour, and then returned with a verdict acquitting all the the priſoners in both numbers.

A loud expreſſion of joy having taken place on this verdict's being found, the *Chief Baron* ſpoke with great reſentment againſt the indecency of ſuch a conduct, and ordered the Sheriff to take any perſon into cuſtody who ſhould again preſume to act in ſuch a manner.

The Court then adjourned to eight o'clock the next morning.

Counſel for the Proſecution.

Mr. Attorney General,
James O'Hara,
Francis Paterſon, and } Eſqrs.
St. George Daly,

Agent, M. Kemmis, the Crown Solicitor.

Counſel in the Defence.

John Bloſſet,
George Joſeph Browne, } Eſqrs.
James D'Arcy,

Agent, Mr. Henry Burke.

FRIDAY

FRIDAY, JUNE 9, 1786.

The TRIAL of *George Robert Fitzgerald*, Eſq.

The Clerk of the Crown called over the Grand Pannel of the county, and afterwards called the defaulters on a fine of 50l. One hundred and twenty having appeared, the priſoners were deſired to look to their challenges; and the Attorney General having aſked if Mr. Fitzgerald and Mr. Brecknock would join in their challenges with the ſeveral other priſoners, Mr. Burke, of counſel for Mr. Fitzgerald, ſaid that they would not. The Attorney General then directed the Clerk of the Crown to give Mr. Fitzgerald and Mr. Brecknock in charge in number two, and then aſked if Mr. Fitzgerald and Mr. Brecknock would join in their challenges as to that number; and Mr. Owen of their counſel, having anſwered they would not, Mr. Attorney General then aſked, if they would conſent to have their peremptory challenges put by; and that propoſal being alſo declined, he directed the Clerk of the Crown to give Mr. Fitzgerald only in charge.

Mr. *Calbeck* obſerved, it was odd to try Mr. Fitzgerald for procuring a murder before they ſubſtantiated any murder.

Mr. *Attorney General* obſerved, that he would be better maſter of the ſubject when he heard the indictment read.

Mr. *Burke* applied to the Court to permit the other priſoners to remain in the dock, as Mr. Fitzgerald apprehended they could give him material aſſiſtance.

The Court having ſhewed a diſpoſition to refuſe the motion, Mr. *Owen* ſuggeſted that Mr. Brecknock only was charged in the preſent indictment, and

and therefore it being a diſtinct fact, they might be permitted to ſtay, and Brecknock only remanded.

The Court refuſed the motion, and the gaol was remanded.

The following perſons were then ſworn of the Petit Jury.

Thomas Lindſay, of Hollymount, Eſq;
Smith Steel, of Foxford, Eſq;
James Lynch, of Cullen, Eſq;
John Moore, of Ballintaffy, Eſq;
James Gildea, junior, of Croſslough, Eſq;
John Joyce, of Oxford, Eſq;
William Ouſley, of Ruſhbrook, Eſq;
Thomas Ormſby, of Ballinamore, Eſq;
Joſeph Lambert, of Togher, Eſq;
William Elliſon, of Tallihoe, Eſq;
Chriſtopher Baynes, of Lakeland, Eſq;
James Miller, of Weſtport, Eſq;

Twelve were put by as being on the Grand Jury, three were put by as being of the name of Mc.-Donnell, and twelve were put by for the Crown; theſe laſt were all put at the deſire of the Attorney General, ſixteen were peremptorily challenged by Mr. Fitzgerald, and one for cauſe of having declared an opinion.

The *Attorney General* informed the Court, that liſts of the witneſſes had been mutually furniſhed to the agents, and he therefore moved, that all the witneſſes ſhould be removed out of each others hearing; and that they ſhould be informed that no witneſs would be examined who remained in court.

The Court ruled accordingly.

While

While the Jury were ſwearing, Mr. *Stanley* aſked the Attorney General, upon which bill of indictment he intended to proceed firſt.

He anſwered, upon the bill againſt Mr. Fitzgerald for procuring the murder of Mr. Mc.Donnell and Mr. Hipſon.

Mr. *Stanley* anſwered, I would object to that mode of proceeding.

The *Attorney General* anſwered, very well, it will be time enough to do that when you hear the bill of indictment read.

George Robert Fitzgerald was then given in charge to the Jury by the Clerk of the Crown, who read a note of the indictment from the crown book, to the following purport :

In number two, you George Robert Fitzgerald, late of Rockfield, Eſq; ſtand indicted, for, that you with another, not having the fear of God before your eyes, but being moved and ſeduced by the inſtigation of the devil, on the 21ſt of February, in the twenty-ſixth year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, and ſo forth, at Rockfield aforeſaid, of your malice prepenſed, wilfully, traitorouſly and felonioufly did *provoke, ſtir up and procure* Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, to *ſlee and murder* one Patrick Randall Mc.Donnell who was then and there a ſubject of

our ſaid lord the King, which ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, Patrick Dorning, otherwiſe Downey and divers other perſons at preſent unknown, on the day aforeſaid, in the year aforeſaid, with force and arms, to wit, at Kilnecarra in the county aforeſaid, in and upon the ſaid Patrick Randall Mc. Donnell in the peace of God and our ſaid lord the King, then and there being *wilfully, traitorouſly and felonioufly, and of their malice prepenſed*, did make an aſſault, and certain guns of the value of five ſhillings each, and every of the ſaid guns, being then and there charged with gunpowder and leaden bullets, which guns they the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, in their right hands reſpectively had and held againſt and upon the ſaid Patrick Randall Mc. Donnell, wilfully, traitorouſly and felonioufly and of their malice prepenſed, did ſhoot and diſcharge, and the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe

otherwiſe Downey, and divers other perſons at preſent unknown, with the leaden bullets aforeſaid, out of the guns aforeſaid, then and there by force of the gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid Patrick Randall Mc. Donnell, wilfully, traitorouſly and felonioufly and of their malice prepenſed, and by the aforeſaid *provocation, ſtirring up and procurement*, then and there did ſtrike, penetrate and wound, giving to the ſaid Patrick Randall Mc. Donnell, with the leaden bullets aforeſaid, ſo as aforeſaid, ſhot, diſcharged and ſent forth out of the guns aforeſaid, by the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robbinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, in and upon the ſaid body of the ſaid Patrick Randall Mc. Donnell, ſeveral mortal wounds of the depth of four inches and of the breadth of half an inch, and of which mortal wounds the aforeſaid Patrick Randall Mc. Donnell, then and there inſtantly died; and the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, the ſaid Patrick Randall Mc. Donnell, then and there in manner and form aforeſaid, *wilfully, traitorouſly and felonioufly, and*

of their malice prepenſed, did ſlee and murder, and the ſaid George Robert Fitzgerald and another, then and there in manner and form aforeſaid, *wilfully, traitorouſly and felonioufly and of their malice prepenſed, did provoke, ſtir up and procure* the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent to the jurors aforeſaid unknown, to *ſlee and murder* in manner and form aforeſaid, the ſaid Patrick Randall Mc. Donnell, then and there being a ſubject of our ſaid lord the King, within this land of Ireland, contrary to the peace of our ſaid lord the King, his crown and dignity, and againſt the form of the ſtatute in that caſe made and provided.

And in number four, you ſtand alſo indicted, that you with another, not having the fear of God before your eyes, but being moved and ſeduced by the inſtigation of the devil, on the 21ſt of February, in the twenty-ſixth year of the reign of our Sovereign Lord George the Third, now King of Great Britain, France and Ireland, and ſo forth, at Gurtrefulla aforeſaid, of their malice prepenſed, did wilfully, traitorouſly and felonioufly *provoke ſtir up and procure* Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny,

ny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, to *ſlee and murder* one Charles Hipſon, who was then and there a ſubject of our ſaid lord the King, which ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, on the day aforeſaid, in the year aforeſaid, with force and arms, to wit, at Gurtnefulla in the county aforeſaid, in and upon the ſaid Charles Hipſon, in the peace of God and our ſaid lord the King, then and there being *wilfully, traitorouſly and felonioufly, and of their malice prepenſed,* did make an aſſault, and certain guns of the value of five ſhillings each, and every of the ſaid guns being then and there charged with gunpowder and leaden bullets, which guns they the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, in their right hands, reſpectively had and held againſt and upon the ſaid Charles Hipſon, wilfully, traitorouſly and felonioufly and of their malice prepenſed, did ſhoot and diſcharge, and the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William

Kelly,

Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saitry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, with the leaden bullets aforeſaid, out of the guns aforeſaid, then and there by force of the gunpowder aforeſaid, ſhot and ſent forth as aforeſaid, the aforeſaid Charles Hipſon, wilfully, traitorouſly and felonioufly and of their malice prepenſed, and by the aforeſaid *provocation, ſtirring up and procurement*, then and there did ſtrike, penetrate and wound, giving to the ſaid Charles Hipſon, with the leaden bullets aforeſaid, ſo as aforeſaid ſhot diſcharged and ſent forth out of the guns aforeſaid, by the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, in and upon the body of the ſaid Charles Hipſon ſeveral mortal wounds of the depth of four inches and of the breadth of half an inch, and of which mortal wounds the aforeſaid Charles Hipſon then and there inſtantly died; and the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox,

Cox, James Maſterſon and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent unknown, the ſaid Charles Hipſon, then and there in manner and form aforeſaid, *wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did flee and murder*, and the ſaid George Robert Fitzgerald and another, then and there in manner and form aforeſaid, *wilfully, traitorouſly, and felonioufly, and of their malice prepenſed, did provoke, ſtir up and procure* the ſaid Andrew Creagh, otherwiſe Craig, James Foy, otherwiſe Sladeen, Humphry George, William Kelly, John Fulton, William Fulton, David Simpſon, otherwiſe Saltry, Archibald Newing, Michael Bruen, John Chapman, John Rehanny, John Burney, William Robinſon, John Cox, Philip Cox, James Maſterſon, and Patrick Dorning, otherwiſe Downey, and divers other perſons at preſent to the jurors aforeſaid unknown, *to flee and murder* in manner and form aforeſaid, the ſaid Charles Hipſon, then and there being a ſubject of our ſaid Lord the King, within this land of Ireland, contrary to the peace of our ſaid Lord the King, his crown and dignity, and againſt the form of the ſtatute in that caſe made and provided.

Mr. *Stanley* objected to Mr. Fitzgerald's being tried upon that bill of indictment until the perſons who actually committed the fact were firſt convicted.

He admitted the rule of law, that in high treaſon there are no acceſſories. All are principals. That every inſtance of incitement, aid, or procurement which in the caſe of felony will render a man an acceſſory before the fact, in the caſe of high treaſon, whether it be treaſon by common law or by ſtatute, will make him a principal in treaſon. But

yet

yet that rule muſt be underſtood with thoſe limitations, which ſound ſenſe and ſubſtantial juſtice requires; for though in the final end and iſſue of the proſecution, the procurer of a treaſon may be conſidered as a principal, yet in all the intermediate ſteps towards his conviction, he ought, from a principle of natural juſtice, to be conſidered meerly in the nature of an acceſſory, and entitled to the ſame privileges and advantages.—— Every act which in the caſe of felony will render a man an acceſſory before the fact, will in the caſe of treaſon make him a principal—*and nothing ſhort of ſuch an act will.*—What circumſtance therefore is neceſſary to render a man an acceſſory before the fact in felony?—clearly this above all others—*that the felony charged upon the principal hath been in fact committed, and committed by the principal*; for which reaſon the acceſſory cannot be tried till the truth of this ſingle fact ſhall have been legally eſtabliſhed either by the conviction or outlawry of the principal.

The ſame equitable rule is by parity of reaſon to be extended to all treaſons of *an acceſſorial derivative nature.* Lord Chief Juſtice Hale, 1 vol. c. 22 f. 233. 239. ſpendeth an intire chapter on this point, he intitles it, "*Concerning Principals and Acceſſories in High Treaſon.*"

The *Court.* Does my Lord Hale treat of any treaſon under an expreſs act of parliament?

Mr. *Stanley*, did not immediately recollect, —but though in conformity to the general language of the law, he calleth every perſon who can any way be conſidered an accomplice in treaſon *a principal in it*, yet when he cometh to ſpeak of the courſe and order to be obſerved in the

the profecution of the offenders. He conſiders thoſe accomplices whoſe ſuppoſed guilt is connected with, and ariſeth out of the real guilt of another in the light of meer acceſſories, and entitled to the ſame privileges and advantages—and it is laid down in ſo many words, 2 Hale, 223. If A. be indicted for high treaſon, and B. for *procuring* it, here it is true they are all principals—but inaſmuch as B. in caſe of felony would have been but acceſſory, and it is poſſible that A. may be acquitted of the fact—B. ſhall not be tried for the procurement 'till A. be convicted. And it is alſo laid down by Mr. Juſtice Forſter, that in all the caſes of treaſon within the ſtatute of 25 Ed. III. the rule prevails, that the inciter or procurer cannot be tried until the actor or principal is convicted, except in the caſe of that branch of treaſon which falleth within the clauſe of compaſſing and imagining the death of the King. In all other caſes whatſoever, either of procuring a perſon to commit treaſon, or of harbouring or receiving a traitor after the fact of treaſon committed, though the inciter or receiver are in the eye of the law principal traitors, *yet thus much they partake of the nature of acceſſories*, that the indictment muſt be ſpecial of the *procurement* and *receipt*, and not of the principal treaſon. If they are indicted by ſeveral indictments from the principal, they cannot be tried 'till the principal is convicted; if they are indicted in the ſame indictment with the principal, the jury muſt be charged to enquire firſt of the principal offender, and if they find him guilty, then of the procurer or receiver; and if the principal be not guilty, then to acquit both; for ſays Lord Hale, though in the eye of the law they are all principals in treaſon, yet (in truth) *he the procurer*, or *receiver*, is ſo far an acceſſory, that he cannot be guilty if the principal be innocent. He ſaid he admitted that in the caſe of Lady Alice Liſle, 4th State Trials, 130, no regard was paid to

this doctrine, and it was without any foundation in law practiſed quite otherwiſe, but her attainder was afterwards reverſed in parliament, and the act recites, among other hardſhips of her caſe—— That ſhe was by an " irregular and undue proſe- " cution indicted and tried for harbouring and re- " ceiving John Hicks, a falſe traitor, *though the " ſaid John Hicks was not at the time of the trial at- " tainted or convicted of any ſuch crime.*" Mr. Juſtice Foſter ſays the ſame equitable rule holds in the caſe of a perſon indicted for inciting or procuring a treaſon of any kind, whether the offence be treaſon at common law or by ſtatute; and therefore if Mr. Fitzgerald ſhould be now put upon his trial, he could not help ſaying, in the words of the act which reverſed the attainder of Lady Liſle, *that George Robert Fitzgerald would be by an irregular and undue proſecution tried for procuring and inciting Andrew Craig, and ſeveral others, to murder Mr. Mc. Donnell, although neither the ſaid Andrew Craig nor any of the other principals were at the time of his trial convicted of any ſuch crime.* The rule he had laid down holds in all treaſons, as well by common law as by ſtatute, but it may be ſaid that the ſtat. of 10 H. VII. c. 21. (if it make murder high treaſon, which he did not admit, *quoad* the offence, though it did *quoad* the puniſhment), diſtinguiſhes this caſe from the other general caſes of treaſon which he had put.

The words of the act are, " If any perſon of " malice prepenſed, do ſlee or murder, or of the " ſaid malice provoke, or procure any other to ſlee " or murder any of the King's ſubjects, he ſhall be " deemed a traitor, and attainted of high treaſon."

It appeared clearly by this act of parliament, that the offence of the procurer has a neceſſary connection with, and dependance upon the guilt of the actor, and it is not like the caſe of high treaſon in compaſſing the death of the King, for in that branch of treaſon, if A. adviſes B. to kill the

the King, the very advice is an overt act of high treason, and it is the only case in the law, where the will is taken for the act—it is high treason to advise another to kill the King, although the advice is never complied with. But will the Attorney General contend, that a person can be found guilty of *procuring* a murder, unless a murder was actually committed in consequence of that procurement. He said therefore that the procurer never could be tried until that fact be established, not by surmise or loose suggestion, nor even by oral testimony; it must be established by the *conviction* of the person who commits the fact, if he is amesnable to justice, or by outlawry if he absconds; and no argument could be drawn from the special penning of the act of Hen. VII. which says, if any person shall murder, or procure another to murder, he shall be deemed traitor, for it is a clear rule of law, which is to be found 2 Haw. 314. and in Conyers case, Dyer 296. that wherever an act of parliament makes an offence treason or felony, it incidentally assumes all the qualities of treason or felony at common law; the same rules of equitable justice prevail in the mode of trial, and the act by necessary implication, makes all the procurers traitors or felons, though not named under the same circumstances, which will make them such in treason or felony at common law; therefore, when the statute makes use of the words procurers, it does nothing more than the law would have implied, it is merely "*expressio eorum quæ tacite insunt*," it is done in this and many other acts of parliament, *ex abundanti cautela*, can have no operation whatsoever to alter or change those equitable rules that prevail in the course and order of proceeding, against the accessorial and the principal traitor. He relied upon it, it did not make the procurement of a murder a distinct substantive *independant* act of treason—He said the guilt of the procurer had a necessary connection with and de-

pendance upon the guilt of the perſon incited or procured to commit the murder—if the murder never was committed in conſequence of the procurement, he relied upon it, the mere procurement or advice (though highly flagitious and criminal) would not make the procurer a traitor; and therefore the offence of the procurer is derived out of, and ſo far connected with the guilt of the principal who actually commits the murder, that the procurer cannot be a traitor, unleſs the principal doth, in conſequence of the procurement commit the murder, and is a traitor alſo.—The offence of the procurer has a neceſſary connection with and dependance upon the guilt of the perſon procured, and it is not like the caſe of treaſon in compaſſing the death of the King, for the very act of adviſing another to kill the King, is an overt act of high treaſon, tho' no other act whatſoever is done towards the completion of his purpoſe. Several acts of parliament which make *offences* felony, go on, and alſo make the procurement a diſtinct independent felony, but was it ever ſaid that a perſon could be indicted and tried for procuring the felony, until the principals were convicted—clearly not. Upon the whole, he conceived that Mr. Fitzgerald could not, conſiſtent with the known rules of law and juſtice, be put upon his trial for procuring the murder, until the principals who committed the fact were firſt tried and convicted.

The *Lord Chief Baron* owned he had great difficulty upon his mind, particularly when he conſidered the abſurdity that might follow—that the procurer might be tried to day and convicted, and the principal, who is charged to have committed the fact by his procurement, might be acquitted the next; and therefore he propoſed to the Attorney General to conſent to diſcharge the jury of Mr. Fitzgerald, and to try the principal firſt.

Several gentlemen riſing to ſpeak on the ſame ſide with Mr. Stanley,

Mr.

Mr. *Attorney General* ſaid he had liſtened with Chriſtian patience to the very long ſpeech which had been made in ſupport of the objection, and he now only deſired to be heard for three minutes: The offence for which the priſoner is indicted, is made a diſtinct ſubſtantive treaſon by the act of the 10th Hen. VII. and therefore there was no colour of reaſon to compare this caſe to the caſe of an acceſſory before the fact to a felony. Nay, the act goes ſo far as to make the procuring the death of a ſubject in this kingdom tantamount to procuring the death of the king. So that a man indicted upon this branch of the ſtatute ſtands as much in the light of a principal traitor as the man who actually commits the murder. It was objected, that if the ſtatute had been ſilent upon this ſubject, that the man accuſed of procuring and inciting would, of neceſſity, in the eye of the law have been guilty of treaſon, inaſmuch as the perſon actually committing the murder is declared to be a traitor. As the act is penned, he denied the aſſertion. The act does not declare the crime of murder generally to be high treaſon, but attaches the penalties of high treaſon upon the perſons of thoſe who ſhall be convicted of the offence—And the words extending to procurers and inciters are preciſely the ſame with the words applied to thoſe who actually commit the murder. Suppoſe the party committing the murder to be an idiot or lunatic—ſuppoſe him not amenable—ſuppoſe he was killed in the affray—will it be contended, that the man inciting or procuring the murder might not, in any of theſe inſtances, be tried upon that branch of the ſtatute in which the priſoner is indicted? But where is the diſadvantage reſulting to the priſoner?—Will he not be allowed to juſtify the homicide? If he can! Will he not be allowed to go into proof, that no homicide was committed? And that too without the prejudice which would neceſſarily ariſe againſt him from the previous conviction of thoſe who ſtand charged

charged with having committed the murder. But admitting for a moment that there is weight in the objection, can the prisoner be let into it at this stage of the trial? He has been given in charge to the Jury on this indictment. If this were an indictment at common law, could an accessory before the fact, after having been given in charge to the Jury, claim his privilege of not being tried till the principal was convicted?—Clearly not.—An accessory to a felony may object to being tried before the principal so convicted; but he may, if he think fit, waive this privilege. And if he suffers himself to be given in charge to the Jury, he does in effect waive it—he cannot then be received to make the objection. As to his consenting to withdraw a Juror, he could not do it. He very well knew, if he were to give such a consent, it would be made the foundation of speeches infinitely longer than those they had heard that day—And, in truth, he did not feel that the objection had any weight.

The *Court* said they could not now let Mr. Fitzgerald's counsel into the objection.

Mr. *Calleck* said he hoped he should be able to alter the opinion of the Court, and would, for that purpose, say nothing from himself, but only read from the Crown Law of Sir Michael Foster a small passage.

The *Court* could not hear him.—They desired to be shewn if they discharged a Juror, that there would be no objection.

Mr. *Stanley* said he was much surprized indeed to hear cases quoted by the Attorney General, which could not by any possibility be tortured into the smallest analogy with the present. The cases of the madman, idiot and the infant, put by the Attorney General, did not apply; for in those cases the procurer is the principal, and the only prin-

principal—the idiot, madman and infant, are the innocent inſtruments of his guilt, and are guilty of no crime whatſoever. The ſettled rule of law is this: That wherever a man procures a murder to be committed, and is abſent at the time it is committed, and no other perſon but himſelf can be adjudged a principal in it, he ſhall be eſteemed as much a principal as if he had been preſent. Upon this ground it is, that if A. intending to poiſon B. deliver poiſon to C. who knows nothing of the matter, to be by him delivered to B. and B. and C. innocently deliver it accordingly, in the abſence of A. or if one incite a madman to kill another, who afterwards kills him in the abſence of the perſon who incited him; in all theſe and the like caſes, the procurer is as much a principal as if he had been preſent when it was done; he is the only perſon criminal, the others are only the inſtruments of death, and have no ſhare whatever in his guilt.——Is that like the caſe of a man of ſound diſcretion and underſtanding, who commits a murder by the procurement of another. But he owned his aſtoniſhment was increaſed indeed, when he heard his Majeſty's Attorney General avow from the bar, that Mr. Fitzgerald voluntarily waived that privilege to which he was by law intitled—that he conſented to be tried before the principals. He appealed to the Attorney General's candour, whether he would avail himſelf of ſuch an advantage?—whether Counſel for Mr. Fitzgerald had not declared before the Jury was ſworn, that he would object to Mr. Fitzgerald's being tried upon the indictment for procuring the murder.—He did not object to the Jury being ſworn, becauſe there was another indictment againſt Mr. Fitzgerald, as a principal actually committing the murder, upon which he might have been tried: and therefore he hoped the Attorney General would not inſiſt upon drawing Mr. Fitzgerald into a con-

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ſent which neither he or his counſel ever did give or meant to accede to.

Mr. *Attorney General* then declared that he would not accede to the propoſition of diſcharging the Jury.

Mr. *Stanley* then ſaid, ſince he had no hopes of ſucceeding, or deriving any advantage from the *candour* of the Attorney General, he would apply himſelf to the juſtice of the Court.—— The Court will not, upon this occaſion, forget that noble declaration of the law, That the Judges are to be Counſel for the priſoner in all capital caſes—to ſee that the proceedings againſt him are ſtrict and regular—and that he is not deluded or drawn into a conſent manifeſtly wrong, and to his prejudice. A priſoner in a capital caſe is not *ſui juris*, he ought not to have been drawn into any conſent at all. If a priſoner in a capital caſe confeſſes the indictment, the judges will not record his confeſſion, but adviſe him to plead Not Guilty. And therefore the juſtice of the caſe is a ſufficient warrant for the Court to diſcharge the Jury, without the conſent of the Attorney General; the old notion, that a Jury once charged in a capital caſe could never be diſcharged, is now exploded. In Kinloch's Caſe in Mr. Forſter's Report, there the Jury were diſcharged after the priſoner pleaded Not Guilty, in order to allow the priſoner a legal advantage which he had loſt. He afterwards pleaded to the juriſdiction of the Court; that plea was over-ruled. The priſoner afterwards pleaded Not Guilty, and was convicted. And afterwards it was moved, in arreſt of judgment, that a jury had been ſworn and charged, and even afterwards diſcharged—And therefore it was a miſtrial. But all the judges of England, except one, held, that a jury might be diſcharged, in order to allow a priſoner the benefit of a legal advantage. And although a jury never could be diſcharged for arbitrary and unconſtitutional purpoſes, as was the

the caſe of Whitebread and Fenwick; yet when the great ends of public juſtice require it, it may and often has been done. In the caſe of the King againſt Daly, at Roſcommon aſſizes, the jury were diſcharged without the conſent of the counſel for the Crown, and without the conſent of the priſoner, he was tried for murder. There was a material variance between the evidence and the indictment, as to the kind of death. The judge diſcharged the jury after evidence given on both ſides, and ſent up a new bill of indictment againſt Daly, upon which he was afterwards convicted before Mr. Juſtice Kelly. Mr. Stanley himſelf had, in that caſe, moved an arreſt of judgment, becauſe the jury were diſcharged after evidence gone thro' and concluded. And contended, that though there were caſes where it had been done, where no evidence at all had been given with the conſent of the priſoner, and in order to extend a legal advantage and benefit to him, yet that it was illegal to do ſo after evidence on both ſides was concluded. But a majority of the Judges of Ireland agreed, that the jury were properly diſcharged, and the priſoner were hanged upon the authority of thoſe caſes. He truſted the Court would diſcharge the jury, and not ſuffer the Attorney General to avail himſelf of ſuch an advantage on the unfortunate gentleman at the bar.

Mr. *Calbeck* ſaid, that the doctrine was ſo ſtrongly laid down in Sir Michael Forſter's Reports, page 342, 343, that he ſhould only read it to the Court.

Here the *Court* interrupted Mr. Calbeck, and *Baron Power* ſaid, if he were to give an opinion at all, he thought he could tell to what the paſſage

in Forſter alluded.—But whether they may take advantage of the mode of proceeding, in evidence or by motion in arreſt of judgment, he was not to direct.

Lord Chief Baron. When the indictment was formerly read at the aſſizes, Mr. Stanley then objected to it, and he talked of demurring; and he was directed then by the Court to *demur* or *plead*; and on conſideration he pleaded.

Mr. *Stanley* then ſaid he did not offer to demur, he only ſaid it was poſſible the priſoner might demur after having before pleaded to an indictment for the ſame fact.—He was not ſo ignorant indeed, that he did not know that he could not benefit himſelf by a plea of *Autrefois* Arraign.

Court. The objection is, that in treaſon the acceſſorial traitor may object to being tried before the principal. If there be any thing in the objection, a mode has been propoſed, and it has been declined by the Attorney General—the trial muſt therefore proceed.

Mr. St. George Daly opened the indictment.—Mr. Attorney General ſtated the caſe.

The firſt witneſs on behalf of the proſecution, Mr. Andrew Gallagher, *examined by* Mr. O'Hara.

He knew Patrick Randall Mc. Donnell and Charles Hipſon. They are dead. He was in company with them on the 20th day of February laſt, between 7 and 8 o'clock in the morning, at Mr. Mc. Donnell's lodgings in Caſtlebar; they proceeded to Liberty-hall—Chancery-hall was the former name of it.—They went there by Breaſy and Minola—that is a round—by Turlogh, Liberty-hall is only

five

five miles from Caſtlebar—by the other way it is eight miles—it is three miles further—the reaſon of going that way was, becauſe they dare not go by Turlogh. Mc.Donnell had not gone that way for half a year before but once or twice. They dreaded they would be ſhot at if they paſſed by Turlogh. They arrived at Liberty-hall, and ſtaid better than an hour. They were for returning home, but immediately before they ſet out, they ſent ſome people to watch leſt they ſhould be ſurpriſed. About 12 o'clock the witneſs urged Mc. Donnell to come away leſt they ſhould be overtaken. When they had come within about a hundred yards of Ballyvarry, they ſaw two men of Mc.Donnell's running to overtake them. They ſtopped to meet theſe men—they were told by the men, that a party of about a hundred men in arms were about Mr. Mc.Donnell's houſe, and as they had not found him, they were going to ſet fire to the houſe. Mc.Donnel ſaid, it was hard he ſhould loſe his houſe, and that it was probable there were people before as well as behind. The witneſs propoſed they ſhould go round near Swineford, and take ſhelter at Mr. Ormſby's, or ſome other perſons. That they were well mounted, and could go on the hill, and ſee what they were doing. They went on the hill, and when they came there, they ſaw a great number of people—ſome of them ſaid they ſaw Mr. Fitzgerald on horſeback—he witneſs did not ſee him then, but perceived that they were ſurrounded. They returned towards Killeen. They ſaw a number of men in arms on foot, and Mr. Fitzgerald and two others on horſeback. Theſe men began to run towards them, and the witneſs and his party galloped at a great rate to Ballyvarra. The witneſs preſſed to get to Foxford—Mc.Donnell ſaid no,

They were too many to do any miſchief. He and his party would ſtay in that little town of Ballyvara. They went into a large houſe there belonging to Mr. Browne. The witneſs went up ſtairs, and ſaw Mr. Fitzgerald from the window. He rode off at the head of one party, and the other party got round the houſe. The witneſs then perceived Mr. Fitzgerald coming up, till he was hid behind the ſtables, which are in the front of the houſe. Some of the men came up near the houſe, others not ſo near. He ſaw James Maſterſon—he was a long time acquainted with him. Maſterſon put up his gun and fired at a middle ſaſh where the witneſs was looking, the ball paſſed within a very ſmall diſtance of his face—two other guns were immediately fired by two others, one was charged with ſwan drops and a ball. He did not know any of the others who fired—there were ſeveral other ſhots fired. The ſtable is about 30 yards from the houſe. He ſaw Mr. Fitzgerald there; he knew him though he was diſguiſed in a large frize coat—he was well mounted. The witneſs aſked from the window what they wanted—he was anſwered by David Saltry, whoſe voice he perfectly knew, that they wanted Mc.Donnell, Hipſon, and the two Gallaghers. The witneſs ſaid, it was the firſt time he had heard any ſuch thing, if they had warrants, they might ſtop from firing and he would give himſelf up. They ſtopped from firing, and for a moment or two deſiſted from forcing the door which they had been breaking. There was no body near the witneſs but one Mr. Crofton, a prieſt, who was hearing confeſſions. The witneſs went into a little room where Mc.Donnell was—there was a parcel of malt there—he ſaid, "It is your life they want Mc.Donnell, hide yourſelf in the malt"

—he

—he accordingly laid himſelf down in the malt, and the witneſs covered him with the malt. The witneſs was then going down, but before he had got down, the party had broken in the lower pannels of the door, and ſome of them had got in. The witneſs called to ſend up the conſtable, and he would give himſelf up, for he was afraid to go down. John Fulton came up, and the witneſs gave himſelf up, thinking him a conſtable—when he came down, a number came round, and among the reſt, one John Mc.Mullen, who was going to ſtrike him, but John Fulton ſaid, do not ill uſe the gentleman he is very quiet. The witneſs called to Hipſon to give himſelf up, and he did ſo. The witneſs went down among a large party, and Mr. Fitzgerald got into their view. Foy abuſed the witneſs—he had a ſtick in his hand, and made an offer of the ſtick towards Mr. Fitzgerald, who then wheeled out of the witneſs's view. The offer which Foy made with the ſtick, was a ſignal—Mr. Fitzgerald retired behind the ſtables, though not cloſe behind them, yet hid from their view. Mr. Mc. Donnell, as he believed, was hid in the malt. The witneſs ſaid he was gone off. When Hipſon came down, Mr. Fitzgerald came galloping to them. He had a ſwitch ſtick in his hand, and by his ſide a ſhort gun. The party huzza'd in joy, that they had taken the witneſs and Hipſon. Mr. Fitzgerald ordered them to be tied together, and ſaid, " he would take care to ſettle us." A party then came down in great triumph with Mc.Donnell, and a ſhout was continued for about ten minutes—Mr. Fitzgerald did not join in the ſhout, but he ſeemed well pleaſed. When they cried, long life to Colonel Fitzgerald, he, Mr. Fitzgerald ſaid, " very well—tie him—tie him." Foy tied Mc. Donnell to the witneſs's left arm, ſo tight, that

Mc.Donnell

Mc.Donnell cried to be looſed; and Foy ſaid, "he would tie him till the blood guſhed from him."

Mr. *Calbeck*. Foy's conduct is nothing to Mr. Fitzgerald.

Court. Was he not tied by Mr. Fitzgerald's directions? Where was Mr. Fitzgerald?

Andrew Gallagher. He was within a yard of Mc.Donnell. The witneſs aſked to ſee the conſtable; they anſwered, that they had a conſtable and a warrant, but they would not ſhew it.—This was before Mc.Donnell was brought down, and before that he had begged to be brought before a magiſtrate. They ſaid, they would bring the witneſs to Sligo. He anſwered, he was very well ſatisfied, he had ſome friends there, who would go bail for him. When Mc.Donnell was tying, Mr. Fitzgerald held his ſwitch over him, and ſaid, "Damn you, you cowardly raſcal, I long have wiſhed to have a ſhot at you, but I have you now, and ſhall take care to puniſh you." He alſo inſulted Hipſon—he ſaid, "he had ſomething againſt him, and would take care to puniſh him." Mc.Donnell aſked to ſee the warrant. Foy or Fulton ſhewed ſome paper, but would not let him look at it.—He aſked to know the crime with which they were charged. He, Mc.Donnell, aſked to be brought before a magiſtrate—it was then only four o'clock—Collector Browne and Mr. Bolingbroke were at General O'Donnell's—they could be there in half an hour with eaſe, if permitted to ride. Mr. Fitzgerald ſaid, "he'd think of it," but immediately after, ordered them to be brought to Turlogh, and ſaid, "he had them, and would take care of them."—They were made

made to walk through a ford. Mr. Lemon, a prieſt, was brought out and tied to Mc.Donnell. While he, Lemon, was tying, the witneſs told Mc. Mullen, who was tying him, that " he was a deſperate looking man, and he could have no luck for his meddling with the clergy." Lemon was not long tied. The witneſs told Mr. Fitzgerald, that the prieſt "had done nothing"—Mr. Fitzgerald ſaid, " he, the prieſt, was a great rogue" —the witneſs told him, there was another prieſt in the houſe hearing confeſſions; and on his being brought out, Mr. Fitzgerald then ordered Lemon the prieſt to be unbound—he did this at the intreaties of his own party. Mr. Fitzgerald and his party were debating, and delayed in conſulting until it grew night fall. Mr. Fitzgerald, Andrew Craig, and Robinſon conſulted together. One time it was determined to bring them to Mr. Bolingbroke's, another time to Turlogh, for as it was late they might be reſcued. They were all tied together until it was found that Mc.Donnell could not walk, from a wound in the calf of his leg. Their horſes were then brought, but Mr. Fitzgerald on ſeeing them, ſaid, they were too good horſes, and ordered that Hipſon and the witneſs ſhould walk, and Mc.Donnell ride. Mc.Donnell was then ſet at liberty—he meant by at liberty, looſe, and Hipſon and the witneſs were again tied. Two men led Mc.Donnell's horſe—afterwards Andrew Creagh, who was on horſe-back, led it.— It was then nearly dark—there were between two and three hundred men, who almoſt all had guns.— The witneſs and Mc.Donnell and Hipſon had received very ill uſage. He, the witneſs, begged to get a drink of water. He had not breakfaſted.—He was told No—and Fulton ſaid, " Damn them, drive them on." They were compelled to wade through a ſtream,

a ſtream, and the witneſs ſtooped and took a drink out of it in the palm of his hand. Mr. Fitzgerald was at the head of the party. They were brought to the houſe of Turlogh. It was debated what to do with them. One Robinſon ſeemed to have great influence over Mr. Fitzgerald. Upon his advice it was determined to let them ſtay till morning. They required to ſee the warrant. Mr. Fitzgerald then brought in a bundle of papers, which he called warrants, and called in a man of the name of Fulton, who having come in Mr. Fitzgerald ſaid, there is your warrant, and there is your priſoners. This was in about a quarter of an hour after they had come to the houſe of Turlogh. Mc.Donnell begged to ſee the warrants. Mr. Fitzgerald ſaid, "No, you will ſee them time enough." Mr. Fitzgerald ſtaid ſome time in the parlour, and then went down from them. In about an hour after he ordered them to be brought up ſtairs; they were brought into a ſmall room on the ſtair-head; four men were with them; they were intended as a guard on them. There was a fire and a piece of candle in the room. The witneſs ſat on a ſhort little form, which contained two of them. Mr. Fitzgerald did not come up until the fire was lighted. Scott, one of Fitzgerald's ſervants, came up and told Mc.Donnell he was ſorry to ſee him—he could bring him a bed to ſtretch on, or wine and water. He brought up a bed. Mr. Fitzgerald came into the room; the witneſs and Hipſon were ſitting on the form; they had laid a bolſter, which came up with the bed, on the form. Mr. Fitzgerald offered to bring Mc. Donnell any thing he ſhould chooſe, and to taſte it before him;—"but as for theſe vagabonds, (meaning Hipſon and the witneſs) how dare they have

have ſuch a ſoft ſeat?"—and ordered the bolſter to be taken from them. Mr. Fitzgerald then went down, and the witneſs ſaw him no more that night. He heard him very frequently. He heard him call ſeveral people by their names, as a ſerjeant calls men on a parade; and he heard the men drink his health. Afterwards a party came up to relieve the guard, and they regularly relieved each other. They remained priſoners all night. Mr. Mc.Donnell ſlept ſome time. The witneſs wakened him. The witneſs never had ſlept at all. Hipſon had ſlept a little. The witneſs ſaid it would ſoon be day. There was a pane broke in the window, which obliged the witneſs to ſhut the ſhutters; he was obliged frequently to ſhut them from the cold. He heard Mr. Fitzgerald call Scott—and call the roll, as he had heard it before; and he heard them drink as before; this was about five o'clock in the morning; the day near clearing. The window is not immediately over the hall-door; it is above it, on one ſide of it. At day he ſaw a number of men regularly drawn up, to the number of twenty or thirty. He ſaw Andrew Creagh and James Foy ſettling them. Mr. Fitzgerald and Mr. Brecknock came to the flag of the hall-door; through the broken pane he heard them converſing; they ſpoke in French, afterwards in Engliſh, but he could not hear what they ſaid, but the names of himſelf, Mc.Donnell and Hipſon were ſeverally mentioned. He heard at that time nothing more than their names. Mr. Fitzgerald called over James Foy and Andrew Creagh, who were ſettling the guard, and ordered them to move a little higher, about ten or twelve yards above the houſe. There was ſome other converſation, which he did not hear. As ſoon as the guard were ſet-

 tled,

tled, Mr. Fitzgerald gave them, Foy and Creagh, orders, " *If they ſaw any reſcue, or colour of a reſcue, be ſure they ſhoot the priſoners, and take care of them.*"

[By the direction of the Court, Gallagher repeated this laſt part of his teſtimony; and at the deſire of one of the Jury repeated it a third time.]

When theſe orders were given, Mr. Fitzgerald ſaid to Mr. Brecknock, " Ha! we ſhall ſoon get rid of them now;" and Mr. Brecknock replied, " Oh, then we ſhall be eaſy indeed." After the guard was ſettled, Mr. Fitzgerald called back Andrew Creagh, and when Creagh came within about ten yards of him, he, Mr. Fitzgerald, ſaid, " Andrew, be ſure you kill them—Do not let one of the villains eſcape." Andrew anſwered, " Oh, never fear, pleaſe your honour." There was nobody then with the witneſs, Mc.Donnell and Hipſon, but Fulton. A man came up to the witneſs and ſaid, he was ſent by Mr. Fitzgerald's directions for Fulton; Fulton went away, and the man ſtaid with him. The witneſs went out again, and ſaw Mr. Fitzgerald and Brecknock along with him. Fulton then returned, and ſaid, " You muſt be tied and brought off to a magiſtrate." It was then a few minutes before ſeven o'clock, for they were brought down exactly at ſeven by his watch. Hipſon's right arm was tied to his left one, by a ſmall kind of cord which the weavers call trums. Mc. Donnell ſaid it was hard to be ſo near Caſtlebar, and not to be brought there. He deſired to know where he was to go to. Mr. Fitzgerald ſaid, he would ſoon know that—the conſtable had directions. Mr. Mc.Donnell was put on horſeback, one John Murphy leading his horſe by the head; Murphy had the bridle in his left, and a ſword in his right hand. The guards were in fours and fives;

there

there were four or five of them before the witneſs, Mr. Mc.Donnell immediately behind the witneſs. He knew of the guard John M'Mullen, John Fulton, William Fulton, one Uing or Ewing, one Wallace Kelly, William Kelly, and Andrew Creagh. James Foy left the houſe at Turlogh with them. He did not know whether Foy continued with them or not. James Maſterſon was not with them. One David Simpſon was of the guard. They had not gone above fifty or ſixty yards from the houſe of Turlogh when he heard Mr. Fitzgerald cry Hollo. He ſaw James Foy then follow them. The witneſs had thrown his eyes conſtantly about him. He heard Craig order the guard to halt. James Foy then came up from converſing with Mr. Fitzgerald and ſpoke with Craig for near five minutes. Foy walked with them. The witneſs cannot tell how far. The guard walked on with the witneſs, Mc.Donnell and Hipſon for about four hundred yards from the houſe at Turlough till they came to a place called Gurthnefulla. The witneſs was very watchful in conſequence of the direction he had heard Mr. Fitzgerald give. From the time the witneſs's quitting the houſe at Turlough, he had been ſure of death. He looked towards the rear and ſaw them in motion, and heard a ſhot, which from his confuſion he thought to be fired by one of the rear guard. And he was ſtill fully ſure it was one of the rear guard.—Before he had ſeen this ſhot he ſaw Andrew Craig ſhove a perſon; and he believes the perſon whom Craig ſhoved was the perſon who fired that ſhot. He heard the ſhot immediately after ſeeing Craig give the ſhove. And he then heard Andrew Craig ſay, There is a ſhot. They are reſcuing. Shoot them. —Immediately then he ſaw a ſecond ſhot fired

from the rear. He then threw up his eyes towards Mc. Donnell, and saw his mare working as if from the noise. His arm was weaving as if broken. He then saw another shot fired at Hipson, which hit him in the left side and passed through his body. And he believes by the fall, Hipson broke the chord which tyed the witness and him together. He could not be sure who fired that shot, but thinks it was a tall man whose face he did not know. A man within about half a foot of him presented his piece at him. And he saw a shot come from the rear guard and hit that man, and wound him, and the man's piece then went off and wounded the witness in his arm and passed along his coat. Three or four more shots were fired at the witness and Mc. Donnell. He still kept looking at Mc. Donnell. He saw Murphy struggling with the mare on which Mc. Donnell rode. He turned Mc. Donnell's breast to the party. The mare plunged and Murphy was thrown down. Mc. Donnell then galloped off, crying murder, and for mercy. The witness ran off after him for forty yards or thereabout. Some of the party cried out, "God damn their souls, they are escaping, why do you not shoot them." There were several shots fired at the witness in the forty yards that he ran. One of the shots was very remarkable. He was sure it was from the blunderbuss, from the manner in which the road was torn up. The witness threw himself into a ditch with his heels uppermost and lay as if dead. He saw the party pursuing Mc. Donnell and swearing most shocking oaths, they will escape. When he thought they were all gone by him, he looked about him in hopes to escape through the fields. He crept over the wall in as low a manner as he could. He saw some of the party round

round Hipſon. He ſaw Cox and Maſterſon there, and a man on a grey horſe. The witneſs thought to get down to the water and eſcape by ſwimming. He ſaw Richy Law on Mc. Donnell's horſe. Law cried out, O you may now return, for by God he is dead in earneſt. The next perſon he ſaw was one Huſton, who uſed the ſame words. Some more of them returned and aſked where the fellow with the blue coat was. The witneſs wore a blue coat. By God, ſays Saltry, here he fell into this buſh, and if he had not life he could not move; they then leaped over the wall, and ſome of them leaped over the witneſs, but the attention of one of them being brought back to the road, he ſaw the witneſs, which as ſoon as the witneſs perceived he begged his life. The witneſs was then brought to the road; William Fulton, who had a blunderbuſs in his hand, was for putting the witneſs to death; the witneſs begged of Huſton to protect his life, who ſaid he could not interfere, and rode off from him to the houſe at Turlough. He ſpoke in extremely moving terms to the guard, ſome of them pityed him, others inſiſted upon his going to the houſe at Turlough, and he went back there againſt his will; as he went, the witneſs ſlipt himſelf before Cox, ſo as to ſave himſelf from being ſhot from behind. As he came towards Mr. Fitzgerald, he ſaw Huſton gallop off towards Caſtlebar; when he came up to Mr. Fitzgerald, he fell upon his knees, and begged to be ſpared for the ſake of his long family. Mr. Fitzgerald bid the witneſs get up, for "I may be moved, leave off your womaniſh tricks." When the witneſs was brought into the parlour, he ſaw Mc. Connell, the man who was wounded, and who ſhot at and wounded the witneſs, and ſomebody taking down what Mc. Connell ſaid. They ſtopped, and Mc. Connell

Connell was taken up ſtairs—Mr. Brecknock ſaid in Mr. Fitzgerald's preſence, that this was a very heinous affair; that the witneſs could be puniſhed for being guilty of ſo heinous a circumſtance as a reſcue—Mr. Fitzgerald ſaid he had ſent for a ſurgeon, Mr. Lindſey, and for a coroner; the ſurgeon to look at the man that was wounded, and at his, the witneſs's arm—Mr. Fitzgerald then went out, and ſhortly after returned. There was a kettle in the room, Mr. Fitzgerald ſaid to the witneſs, he had better drink ſomething—by the ſmell, the liquor was whiſkey, Mr. Fitzgerald brought it down—he heard Mr. Fitzgerald's health drank—Mr. Fitzgerald returned, and aſked the witneſs, would he dreſs his arm himſelf? the witneſs ſaid, "No," he would wait until the ſurgeon came, as he had no things to dreſs himſelf, and it would put him to double pain. Fitzgerald and Brecknock went out and chattered in French, they returned, and ſeveral of the party came in, and ſhewed ſeveral of the places where they were wounded. Mr. Fitzgerald ſaid this is a very unfortunate affair, ſee what they have got by it, they have killed their own party, and hurt none but the unfortunate man above ſtairs—the witneſs aſſented to every thing they ſaid. Mr. Brecknock ſaid to the witneſs, "You are as guilty as if you had a gun, and reſcued yourſelf." Scott had brought ſome water for the man who was wounded, and the witneſs drank of it, and alſo ſome wine and water, after he ſeen Mr. Fitzgerald drink—he ſaw Scotch Andrew coming up on a mare towards Turlough; the mare was the ſame which had been met by the witneſs when he was brought priſoner to Turlough—he heard Andrew ſinging a ſong, and crying "How are you lads? "high for the bloody North for ever." Mr. Fitzgerald ſaid he would

would ſend for Mr. Baynes; he afterwards ſaid, he had got a note from Mr. Baynes, that he was ill; he deſired the witneſs to write a note to his brother, which the witneſs did not, but ſaid he would write a note to his wife to make her eaſy—Mr. Fitzgerald ſaid he would ſend it by a woman to Caſtlebar, Mr. Fitzgerald and he had many converſations, the witneſs flattered Mr. Fitzgerald, and told him he wiſhed him to be his friend, for there was no man of ſpirit in the county but himſelf, meaning Mr. Fitzgerald; and the witneſs ſaid, he loved a man of ſpirit. Mr. Fitzgerald then gave him his honour that he would not proſecute him, and that when the magiſtrate came he would himſelf be bail for him; and if, as he believed, it was not a bailable offence, if the magiſtrate would not take bail, he would contrive to let the witneſs eſcape. Neither the witneſs, nor Mc.Donnell, nor Hipſon, had any arms, nor could they have had any without his knowledge; nor did any perſon whatſoever make any oppoſition to their being taken before a magiſtrate.

He was croſs examined by Mr. Calbeck.

Hipſon had a gun when he left Caſtlebar; he gave it to one of the ſervants at Mr. Mc.Donnell's. Hipſon was a ſhoemaker; he had been formerly a dragoon. Mr. Fitzgerald ſaid he would ſend a woman to Caſtlebar, becauſe he might naturally ſuppoſe, that ſome ill uſage would happen to his people from the conduct of that day. He frequently ſaw Mr. Fitzgerald's people in Caſtlebar, and he was ſure that not two days before this affair, Mr. Fitzgerald's people would not ſuffer any injury at Caſtlebar. The witneſs ſhut the doors of the houſe of Ballyvara; no ſhots ever were fired

out

out of the houſe; Mr. Fitzgerald's gun was not diſcharged there. They conſulted at one time to take them before Bollingbroke. He believes he never heard a word of a man of the name of Murphy having ſworn examinations againſt them. He could form no belief whether any ſuch examinations were ſworn. He had heard afterwards that ſuch examination were ſworn, but could not tell whether there were or not; not having ſeen them he could form a belief of a fact not within his own knowledge, when a man of truth told him it, but not when he was told by perſons as inſignificant as himſelf. He believes that examinations were ſworn againſt him before a magiſtrate, and does not know but there might be warrants upon them. The reaſon that was given for their not going to Mr. Bollingbroke's, as it was too late, was not given until after they were brought to Turlogh. The witneſs, nor Mc.Donnell, nor Hipſon, did not agree to go to Turlogh. The party ſaid they would bring them to a magiſtrate, but did not name Mr. Bollingbroke at Turlough. Robinſon was againſt their going that night. There was a centinel always upon them (Mc.Donnell, Hipſon, and the witneſs). The centinel was not Foy—Fulton, Newing, or Ewing, and Wallace Kelly, were centinels. Fulton was in the room, and did not hinder the witneſs from looking out of the window. His face was to the place of the pane; he could ſee as well, but not hear as well, as if the window were up. He ſaw Mr. Fitzgerald perfectly, becauſe there was a little porch outſide of the door, and he ſtood outſide of the porch; the window was at one ſide of the porch; the wall of the porch could not cover Mr. Fitzgerald from his view, his ſituation prevented it from covering him. The

witneſs

witneſs could not tell whether Mr. Fitzgerald's party were diſciplined, he never ſaw them perform the manual, or go through any manœuvres; ſeveral of them ſaw him looking from the window, they did not perceive it to be of any conſequence, whether he looked or not. The only reaſon he could give for his ſafety was, that the providence of God was greater than their power. He knew that perſons could be concealed behind the walls, but he did not believe that there were perſons there for the purpoſe of reſcuing him, Mr. Mc Donnell or Hipſon. Mr. Fitzgerald did give him wine and water. The word *ſettled* made uſe of by Mr. Fitzgerald might mean *to puniſh them by law*, but he did not believe that was Mr. Fitzgeralds meaning. He believed, that the caſe which Mr. Fitzgerald ſaid was not bailable, was the murder which happened in conſequence of the reſcue. He ſaw a great mob come to Mr. Fitzgerald's houſe, but he did not ſee chairs or tables, broken, or the houſe diſmantled; but he ſaw doors broken. He himſelf was then ſafe. He remembers ſeeing Mr. Elliſon at Turlough. He could not recollect the people who came to liberate him. He himſelf helped to look for Mr. Fitzgerald. There was a charge againſt him of a capital crime, but he did not believe that Mr. Fitzgerald could identify him. By the virtue of his oath the charge againſt him had no more effect upon him than if there had been no ſort of proſecution againſt him; nor can he form any belief whether any perſon could prove his being preſent at the affray in the Goal.

To a queſtion from one of the jurors.

He anſwered it was impoſſible for them to procure any perſon to reſcue them, for they were not permitted to ſpeak to any perſon.

To a queſtion from the court.

He anſwred, that the party were taking the pri- towards Sligo; and from Caſtlebar to Turlogh, is three miles.

The Second witneſs for the Proſecution, W. Kelly, examined by Mr. Patterſon.

The witneſs lived in February laſt in Turlough, the eſtate of George Robert Fitzgerald. James Foy came to him on the 20th of February laſt, and delivered a meſſage to the witneſs, that Mr. Fitzgerald wanted a word with him. He went to Turlough, and ſaw Mr. Fitzgerald. He ſaw him in his own parlour, there were ten or twelve people with him. There were fire-arms, guns and blunderbuſſes in the room with him. Mr. Fitzgerald told the witneſs that he had a warrant for Patrick Randle Mc. Donnell, Charles Hipſon, and the two Gallagher's. He deſired them to go to Mr. Mc. Donnell's houſe, and take them priſoners, and if they ſaw them in the houſe to break it open, for the warrants allowed it; and if they made their eſcape or fled, to be ſure to ſhoot them. Before they ſet out each man got a glaſs of Spirits in the parlour. They left Mr. Fitzgerald in the houſe of Turlough. He ſaw Mr. Fitzgerald next in Ballyvarry. Before he reached Ballyvary he heard many ſhots. Mr. Mc. Donnell, Charles Hipſon, and Andrew Gallagher were in cuſtody of Mr. Fitzgerald's men when the witneſs came up. They were tied by Mr. Fitzgerald's directions; Hipſon and Gallagher were tied, and at firſt Mr. Mc. Donnell; but he was afterwards looſed and put on his horſe. Mr. Fitzgerald did nothing, but ſaid he was *fond* that he had them in cuſtody. He cannot tell

what

what time they came into Turlough; they were there all night, they were ſent away between ſeven and eight in the morning—he was a ſtranger in the place; and did not know many of them. John Fulton, William Fulton, Andrew Craig, and David Simpſon were of the guard. Andrew Craig told him, he, the witneſs, was to be put in the front of the guard, and bid him not to look behind, or regard what paſſed; but go ſtrait forward. Before they ſet out, they received directions to go to Mr. Bollingbroke's, and Mr. Fitzgerald told them, that if any *operation* or reſcue happened, to ſhoot the priſoners. At about a quarter of a mile from Mr. Fitzgerald's, a man next to him, one Mc. Connell, ſaid he heard a ſhot or two, and the witneſs heard Craig cry a *reſcue*—The witneſs heard two ſhots more. He turned about, and ſaw Craig and Fulton fire, and ſaw Gallagher and Hipſon fall, and James Mc. Connell fell alſo. He ſaw Mc. Donnell coming by him on the left hand ſide of the road, crying Murder! ſave my life! and Craig cried he would have his life. He ſaw Mc. Donnell ſtopped by a man with a hatchet; and ſaw Craig purſue him. A young man had hold of the mare, and Knox's boy brought him (Mc. Donnell) a drink of water in a noggin, and then went into Knox's houſe to get him aſſiſtance. Craig then came up, and preſented his piece at Mc. Donnell, and the witneſs cried Murder! Andrew, don't hurt the Gentleman more. Craig then ſwore he would drive the contents through his ſoul, and fired the contents at him. Mc. Donnell did not live fifteen minutes. Craig ſaid, "Long he has deſerved that." The arm that was next to Andrew was not broken before the ſhot. After the ſhot it appeared to be broken.

There

There was no man on the road but their own party.

He was croſs-examined by Mr. Burke.

He thought he was going to do a legal act—He went innocently—One Hogan took him priſoner —He thought it was better for him to turn, than to let innocent people ſuffer. He did not ſwear to ſave his life—Nobody had ever told him, that unleſs he told the truth, he would be hanged— He never remembers to have ſaid to Moran, the Gaoler, that Mr. Fitzgerald was a good maſter.

To a Queſtion put by one of the Jurors, he ſaid,

That Mr. Mc Donnell's arm when he ſaw him at the Bridge of Kilnacarra, did not appear to be broken before Craig ſhot at him.

Third Witneſs for the Proſecution, Andrew Craig,

Examined by Mr. *Attorney General.*

He lived on the 20th of Feb. with Mr. Fitzgerald. He was ſent by Mr. Fitzgerald, on the day before Mc Donnell was ſhot laſt, to collect ſome men, the Tenants. He Mr. Fitzgerald wanted them to take Mc. Donnell, Andrew Gallagher, and Charles Hipſon. He did collect them; and Mr. Fitzgerald's ſteward gave them ſome whiſkey. Mr. Fitzgerald deſired them to take them, Mc Donnell, Gallagher, and Hipſon, *at the peril of their lives, let the conſequence be what it would.* Mr. Fitzgerald called to the witneſs and ſpoke to him. He deſired the witneſs to tell Fulton and Mc Mullen to ſhoot the priſoners in the taking, and when they were ſhot to bring in all their arms; and not to break the

the Houſe, for it would be a good Houſe, for a Miniſter. *Not to make a botch'd job of it as it had often been before*, for he, (Fitzgerald himſelf,) would go und ſhoot him, (Mc Donnell,) through the center of the heart, but that he muſt ſtand clear to ſave Fulton and Mc Mullen. They went to Mc Donnell's, and found he had been there. There were two common men in the Houſe. They took ſeven or eight guns from it and went to the bridge, from whence they ſaw Mc Donnell, Andrew Gallagher, and Hipſon, on a hill. The men were for going down to take them. The witneſs bid them come back. Some of the party aſked him if he had natural feeling, or was he a coward ? The witneſs ſent a meſſenger to Mr. Fitzgerald, and told him he would go to Breaſy. Mr. Fitzgerald was not at Turlough. The witneſs underſtood that Mr. Fitzgerald was gone another way in ſearch of them. The witneſs went home to get a Horſe. He received a meſſage that Mc Donnell and his party were *pinned* at Ballyvara. He ſett off and found them; and Foy ſaid, now we are joined, whoever has a mind not to aſſiſt, let him lay down his arms. Seven or Eihgt ſhots were then fired at the Houſe of Ballyvara. Mr. Fitzgerald was about 200 yards off, in a hollow, in diſguiſe, in a common man's coat. There was no body with him but Scot. After the ſhots a meſſage came up from Mr. Fitzgerald, to know what they were doing. The Conſtable and others then broke the doors open, went in and took Mc Donnell, Gallagher, and Hipſon. Mc Donnell aſked to be brought before a Juſtice. Mc Donnell was not tied, he rode upon his own mare. Before they went to the Houſe at Turlough, Mr. Fitzgerald took

took the witneſs aſide and ſaid, they had better take them to Mr. Bollingbroke's and ſhoot them by the way; that it was a very bad managed job that they had not been ſhot in the taking. The witneſs ſaid it might be better managed by taking them to Turlough; and Mr. Fitzgerald conſented. The witneſs begged as a favour to himſelf to be permitted to turn Gallagher away. Mr. Fitzgerald parted from them when they came to the Houſe at Turlough. John Chawner ſent for the witneſs and deſired him to call for his maſter. They met in the garden at Turlough with Chawner. Mr. Fitzgerald mentioned to the witneſs to ſend the priſoners out *upon ſight*, that is, that minute, that Chawner might ſhoot them. The witneſs was deſired to look for Chawner's former gun. He ſearched for and found it; and Chawner loaded it with a brace of bullets. It was agreed to ſend them out directly. Chawner was to ſhoot Mc Donnell. Fulton and Mullen to ſhoot the other two. When the witneſs was almoſt leaving them he ſpoke for ſaving Gallagher. Chawner agreed and mentioned it two or three times, to which Mr. Fitzgerald anſwered, *No, ſhoot the covey; the covey! dead dogs tell no tales!* Chawner was in the hay yard waiting for them to come out. Chawner propoſed to ſhoot them up ſtairs; and to pretend they had attempted to eſcape. At 12 o'clock at night, he wanted to have the priſoners ſent out, that he might ſhoot them. The witneſs went into the room where the priſoners were, and having turned out the guard deſired Gallagher, Mc. Donnell, and Hipſon, let what would happen to keep ſilent; Mc. Donnell thanked him; and the witneſs ſaid, a ſhut mouth makes a wiſe ——— and he pointed

pointed with his finger to his head. In the morning the witneſs called up Mr. Fitzgerald, who bid him ſelect twenty of the moſt active men amongſt the tenants. He did ſo and brought them to the hall, where ſpirits of whiſkey were given to them. Mr. Fitzgerald told him the affair was managed badly, that they were not let to go laſt night; the country would be up in arms, and his men would be ſhot;—but he had found a plan to have the priſoners ſhot like dogs. His plan was, firſt to charge a gun with two fingers and a half of powder, and ſeven fingers of ſmall ſnipe ſhot; and then to ſend a man on with that, who ſhould fire from the wall of the park, with directions to fire at and ſpare none. It would *ſmarten* them up to buſineſs; the party would think it a reſcue, and the ſmall ſhot would not damage them. Mr. Fitzgerald called in the witneſs; and Mr. Brecknock brought a law book. Mr. Brecknock pointed out a place in the book, and ſaid, that was what he (Mr. Fitzgerald) wanted. Mr. Fitzgerald looked at the book, and ſaid, or read in the book, that they were indicted for felony, and if any attempt was made to reſcue them, it was lawful to ſhoot them. Mr. Fitzgerald deſired him to go and move up the guard further, and deliver theſe directions to them, which the witneſs did. Mr. Fitzgerald deſired the witneſs to go to Fulton and tell him to ſhoot McDonnell; and Mullen to ſhoot Hipſon; and *he* would ſend Foy to ſhoot Andrew Gallagher. The witneſs anſwered, that if Foy went, he would not go; and ſaid, that he, the witneſs, would get a man to ſhoot Andrew Gallagher. Shortly after the witneſs aſked Chambers, *would he kill a man for him?* Chambers anſwered, *he would not for his maſter's eſtate.*

The

The witneſs ſaid the charge in the piece, he would give him, would not kill a rat. The witneſs then drew it to ſhew him, and Chambers conſented to go to Fulton and Mullen. As they went he deſired Chambers not to tell them, but he had a good charge. At the hall door Mr. Fitzgerald deſired them *not to make a botched piece of work of it, as was often done before*, for Mr. Mc'Donnell and he could not live in the country together; and if McDonnell was not ſhot he would take his mare and quit the country. Mr. Fitzgerald deſired the witneſs to go up and tie the priſoners. The witneſs ſaid he would not; he never tied any man. None were tied but ſheep-ſtealers and robbers. Hipſon and Gallagher were tied together, and McDonnell rode on his mare. Murphy led him, John Fulton, John Mullen, David Simpſon, Kelly, Dornin, John Fohender, himſelf and Murphy, were of the guard. Foy was ſent after him when he was about two hundred yards from the houſe, with a meſſage, that the witneſs had before talked of ſaving Andrew Gallagher; that he might as well let the whole eſcape,—that no ſuch motion ſhould be made. The witneſs called to the guard to ſhorten their ſtep, but they did not mind him. A ſhot was fired about two or three hundred yards from the deer-park-gate, by one of Mr. Fitzgerald's party.—One Nelly, or Lelly, a clerk, who had drawn leaſes for Mr. Fitzgerald, fired that ſhot. That was the ſhot which was to *ſmarten* the party up to buſineſs. The witneſs got directions before, when that ſhot was fired, to cry out a *reſcue*, and he did ſo.—Hipſon was ſhot by Mullen. Chambers fired.—One of the men of their own party had a ſpleen againſt another, and, as the witneſs ſuppoſes, took an opportunity,

portunity, and killed their own man. The witneſs ſaw Mc Donnell's mare rearing in Murphy's hand; his breaſt towards them.—Three of the party fired at him;—believes Fulton to be one of them; the ſhot took effect, for the witneſs ſaw one of his (Mc Donnell's) arms flinging as if broke. Mc'Donnell fled towards Kilnacarra. The witneſs does not know whether he (Mc Donnell) was ſtopped or not. The witneſs went to a ſhoe-maker's houſe, and borrowed the ſhoe-maker's mare, and purſued McDonnell. The witneſs overtook him. Fired at him. He was ſhot dead.—The party left Gallagher behind. Some others of the party took Gallagher home to Turlough. Gallagher had got home before the witneſs. The witneſs met a man who had Mc Donnell's mare, whom he ſent to know what was to be done with the dead bodies. The witneſs ſaw Mr. Fitzgerald, who ſaid, they had made a *bad job* to leave Andrew Gallagher alive to hang them all; That muſt not be. Gallagher ſhould be ſent to a juſtice and ſhot on the road; the witneſs ſaid he would not do it, they ſhould kill him firſt. He (Gallagher) had made a penetrating ſpeech, and if Mr. Fitzgerald did not pity him, to pity his wife and children, for his children would be fatherleſs, and his wife a widow. The witneſs at length ſettled with his maſter to ſend Gallagher to Huſton's. The witneſs's reaſon for ſaving Gallagher was his friendſhip for him,—Gallagher had inoculated his children, and given them medicines. The witneſs knew of other attempts made upon Mr. Mc Donnell by Mr. Fitzgerald, one in particular immediately previous to the laſt aſſizes.

Mr. *Burk* objected to giving evidence of this kind, as Mr. Fitzgerald had been already indicted, tried for and acquitted of that offence.

The Court over-ruled the objection, declaring that a witneſs had a right to give evidence of every thing that ſhewed *Malice* in Mr. Fitzgerald.

Andrew Craig. The firſt attempt he knew of Mr. Fitzgerald, upon Mc. Donnell, was ſhortly before thelaſt aſſizes, on the day that Mc. Donnell paſſed by the pound, and had a converſation with Mr. Fitzgerald. Shortly after Mr. Fitzgerald deſired the witneſs to charge a muſket with ſlugs, for he, Mr. Fitzgerald wanted it to ſhoot otters; the witneſs did ſo, and then went to ſhoot magpyes. When he returned he was aſked by Mr. Fitzgerald if Mc. Donnell had gone by—He told Mr. Fitzgerald he belived not. The witneſs then went into the ſcullery and drew the charge out of the muſket he had loaded for Mr. Fitzgerald, and put in a little turf, and chewed paper inſtead of the balls. He went home to his own houſe in the evening, and found one of his childern burnt. He returned to Mr. Fitzgerald's to get ſome white lead and oyl, to put to his child, and went to the hay-loft for that purpoſe. He heard the two Mc. Donnells ride by, talking of peace and quietneſs. He ſaw a man from the corner of the houſe ſhoot at Mc. Donnell; and he ſaw that man return to Mr. Fitzgerald, and heard Mr. Fitzgerald ſay to him, "Good night, my faithful friend Foy." When the witneſs came from the ſtables, Mr. Fitzgerald aſked him what he had been doing? the witneſs ſaid, he had come leſt any thing was amiſs amongſt the horſes. Mr. Fitzgerald aſked him if he had hard a ſhot. The witneſs ſaid not. When he came the next morning to Turlough, he was aſked

aſked by Mr. Fitzgerald if he had heard any news. The witneſs ſaid he had heard very bad news; that Mc. Donnell was ſhot paſſing by the road three inches in his head. Mr. Fitzgerald ſaid, damn the drunken ſcoundrel, he had been hurt by ſome of his own party. Mr. Fitzgerald wanted the witneſs to ſwear that Mc. Donnell had fired the firſt ſhot. The witneſs refuſed it, ſaying no, let the man who fired it ſwear. A ball happened to be found on the road, which was preſerved, and ſome holes on the houſe ſhewn as marks of ſhooting. The next attempt he knew upon Mc. Donnell was; He and Fulton were directed to go to Chancery Hall. They went there nine or ten times in order to ſhoot at Mc. Donnell, one night that they went there three of the windows were open, and Fulton ſaid, "Bad luck to you who left the windows open if you knew what we were about." Another night Fulton ſeemed very dull, he ſaid his father had loſt every thing by coming into that country, and if he (Fulton) did not ſhoot Mc. Donnell, Mr. Fitzgerald would turn them off, but the witneſs would rather loſe every thing than ſhoot at a man. The witneſs told him there was a way to ſettle all that, which was to fire in at the windows when nobody was in the room, and it would be talked of as an attempt upon Mc. Donnell. Fulton did ſo, and the witneſs rode off and told Mr. Fitzgerald that there was bad news, that Fulton had fired into Mr. Mc. Donnell's houſe, and the witneſs was afraid he was taken. Mr. Fitzgerald ſeemed rather to bemoan the loſs of a gun and caſe of piſtols, that Fulton had with him, than Fulton's being taken. He knew of another attempt on Mr. Mc. Donnell. He (Fitzgerald) ordered him to go to Keelogues and ſhoot Mc. Donnell out of a brogue-maker's houſe.

houſe. On another occaſion he had directed Mullen and Fulton to ſhoot Mc. Donnell. At one time when the witneſs objected to doing this kind of buſineſs, ſaying that he was a man who had a family, that he had a good character, and the affair would come to light, Mr. Fitzgerald ſaid ſince he was ſo delicate, to ſend Murphy to him, that he might ſend him to Capperary Houſe where John Chawner was to bring Mc. Donnell. Chawner lived with Mc. Donnell as a ſportſman. Chawner had formerly lived with Mr. Fitzgerald.

He was croſs-examined by Mr. Owen.

It was ſince he came to goal that he reſolved to give evidence. He had made his eſcape. He was taken near Dublin. He could not tell how long ſince. Nobody prevailed with him to make his confeſſion. He could not tell why he did not make it before he was taken. There was no meſſage ever ſent to him about it. He never had any converſation with the Attorney General. Never ſaw him but at the laſt aſſizes, and at Mr. Conolly's once hunting. No perſon ever ſpoke to him about confeſſing. Mr. Fitzgerald told him he had warrants. Brecknock pointed out the place in a law book. Mr. Fitzgerald ſaid it was an act of parliament, and that it was lawful to ſhoot people when indicted for felony. The witneſs did not know whether they had a warrant or not. Mr. Fitzgerald appointed a place to ſhoot Mc. Donnell and the other priſoners when the *reſcue* ſhot, as he Mr. Fitzgerald called it, ſhould be fired. The witneſs could have killed Gallagher himſelf, but he wiſhed to keep his hands clean.—When upon other occaſions he has had ſcruples, Mr. Fitzgerald had repeatedly told him,

him, that he ought to obey his Mr. Fitzgerald, his maſter's orders, and that no judge or jury would or could find him guilty for ſo doing. The witneſs had hopes of being ſaved on account of his evidence.

Fourth witneſs for the proſecution.

The Rev. Mr. Ellison examined by Mr. Daly.

He took the information of Andrew Craig about a month ago. Before that he had taken his confeſſion. The goaler had told him Andrew Craig wiſhed to ſee Mr. Cuff, James Brown and the witneſs, and would tell nothing till they all were together. Mr. Ormſby was preſent. Andrew confeſt in much the ſame manner, that he had that day given evidence upon the table. He ſaid, he hoped it would be for the good of his ſoul, and that he hoped Mr. Cuff would make intereſt for him. There was no promiſe whatſoever made him. Mr. Cuff told him if his conduct deſerved any mercy he would apply for him: but there was no promiſe whatſoever made. He took Mr. Thompſon with him upon another occaſion, that he might have a reſpectable witneſs. When Andrew ſwore the information there was no promiſe made to him.

He was croſs-examined by Mr. Stanly.

Craig had made his confeſſion before the aſſizes. One Heeny, a man of his (Craig's) own chuſing, drew his confeſſion. He had not returned his confeſſion to the Clerk of the Crown. He had kept it till the Attorney General came to Caſtlebar, and then gave it to him; and the Attorney General afterwards

afterwards returned it to the witneſs. He had kept it ever ſince. He never had compared the confeſſion and information, but from his memory they correſponded. The information was written by his Clerk. He left his Clerk to take down the information in writing. The witneſs examined Craig over and over again by the written examinations. The witneſs apprehended Mr. Fitzgerald the day Mr. Mc. Donnell was killed. He alſo apprehended Fulton. He did not examine him at the time of apprehending him. The Gaoler went from the witneſs for the warrants, if Fulton had any, and brought a perſon to be witneſs of his conduct. The Gaoler brought ſeveral papers, (which the witneſs now produced;) three of the warrants, he believes, were ſigned by Alexander O'Malley. He had ſeen his hand-writing as a Juſtice of Peace. One of the warrants he was ſure was the hand-writing of Mr. Bolingbroke. He was not ſure whether the name William Fulton inſerted in the warrants, was or was not Mr. Fitzgerald's hand-writing; but believed it to be his hand-writing.

Fifth Witneſs.

The Rev. Thomas Thompſon examined by Mr. Bloſſet.

He knows Andrew Craig. He ſaw him in the gaol with Mr. Elliſon, in company with the Gaoler and the Clerk, who took his depoſition fairly. There were no promiſes made to him, he heard Craig make a verbal confeſſion, and it was the ſame with the written one. The witneſs had applied to the Attorney General, both perſonally

ſonally and by letter, to know if he was to prepare Craig for eternity, and the anſwer he received was, that he was; and the witneſs at all times told Craig ſo, and Craig always adhered to the ſame ſtory.

He was croſs-examined by Mr. Calbeck.

It was natural to ſuppoſe, that he (Craig) was agitated by hopes and fears of life; and the witneſs dared ſay, he might have been ſo.

To a queſtion from one of the Jurors,

He ſaid, he never heard, that any perſon made him a promiſe of any thing to induce him to make his confeſſion. He knew one of the perſons alluded to had deſired him to tell Craig, that he made him no promiſe, nor gave him any hopes. The perſon the witneſs now alluded to was Mr. Cuff.

Here the PROSECUTION cloſed.

Mr. *Calbeck* roſe to ſtate a Caſe, and Mr. *Baron Power* objected to it as being diſorderly.

The *Chief Baron* ſaid, that he did remember in the caſe of the White Boys, on a Special Commiſſion, Lord Chief Juſtice Clayton, Mr. Juſtice Lill, and Mr. Juſtice Malone did permit a Caſe to be ſtated, but not as a matter of right, but as a matter of favour.

Mr. *Baron Power* when at the Bar, never had ſeen it practiſed, when on the Bench never had ſuffered it, and he did not think he could now permit it.

Mr. *Calbeck*

Mr. *Calbeck* ſaid, that it was done in the caſe of the Hearts of Steel.

Mr. *Baron Power* told him that he was miſtaken; but he believed not wilfully. He the Baron had himſelf ſat upon that occaſion with Lord Annaly and the late Chief Baron Foſter. The late Chief Baron Burgh had ſpoken very ably as to points of law, but there was no attempt of that ſort.

The Priſoner went into his Defence.

John Scott, the firſt witneſs therein, was examined by Mr. Calbeck.

He lived at Turlough with Mr. Fitzgerald.—Alexander O'Malley is a Juſtice of Peace for the County of Mayo; on the 18th Mr. O'Malley was at Turlough, and ſigned and ſealed the warrant then produced to him.

He was croſs-examined by the Attorney General.

He was ſure that the name William Fulton in the direction of that warrant was not Mr. Fitzgerald's hand-writing. William Fulton wrote his own name, and not the Priſoner. The name William Fulton was written before the Warrant was ſigned and ſealed by the Magiſtrates.

The Clerk of the Crown, by order of the Court, then read the following warrant.

A war-

A warrant, ſigned Alexander O'Maley, dated 18th February, 1786.

County of Mayo to wit. } WHEREAS I have this day received information upon oath, of John Murphy of Drinanough in the pariſh of Killicommouge, barony of Cavan and county of Mayo, that on the 9th day of January laſt, informant was committed to Caſtlebar gaol on a falſe occaſion of Patrick Randal Mc Donnell of Caſtlebar aforeſaid, where informant was neck-yoked by order of ſaid Mc Donnell, and no perſon allowed to bring him the common neceſſaries of life, nor pen, ink or paper, during the ſpace of eighteen or twenty days: during which time he was viſited ſeveral times by the aforeſaid Patrick Randal Mc Donnell. John Gallagher, Andrew Gallagher, William Melvin, Robert Metlan, and Charles Hipſon, all of Caſtlebar aforeſaid, all of which ſeverally and repeatedly threatened to take informant's life, if he did not ſwear that George Robert Fitzgerald, Eſq; of Turlough, deſired, or rather commanded him to fire a ſhot at the aforeſaid Patrick Randal Mc Donnell.

That upon ſending his diſcharge to the gaoler, in whoſe care he was, who enlarged him; he was met by the aforeſaid Patrick Randal Mc Donnell, who moſt violently and felonioufly ſeized him and dragged him back into the body of the gaol, and taking the keys from the gaoler, locked him in, carrying the key along with him to his lodging, and ſo continued to keep informant in confinement for the ſpace of ten or twelve hours, without any order whatſoever; at the end of which time he brought a freſh committal againſt him, deli-

vering the keys with ſaid committal, to the gaoler.

Saith, upon being lawfully diſcharged a ſecond time, he was met by ſaid Patrick Randal Mc Donnell and Hipſon aforeſaid, who ſeized him as aforeſaid, telling him that he would lodge him in a place that no diſcharge would or could releaſe him from; upon which they dragged him to the houſe of Michael Moran, cabinet-maker and alehouſe-keeper in Caſtlebar aforeſaid, who, upon ſeeing him, advanced with a naked ſword in his hand, ſwearing by G—d that he had a great mind to take his life before he would part him; upon which he was dragged up ſtairs in ſaid houſe and lodged in a room therein, where there was a ſtrong guard of the aforeſaid banditti placed over him, which guard forced him to creep in under a table, where they watched or guarded him with nine guns or bayonets, ſix or eight caſe of piſtols, and four halberts.

That the ſaid Patrick Randal Mc Donnell gave ſtrict orders to the aforeſaid guard or banditti, that in caſe there ſhould be any lawful demand made by informant, that they might take away his life, and let thoſe that made ſuch a demand take his corpſe, which informant believes they would have done were it not for the interpoſition of the high ſheriff that enlarged him.

Theſe are therefore in his majeſty's name ſtrictly charging and commanding you the under-named, upon ſight hereof, to apprehend the bodies of Patrick Randal Mc Donnell, John Gallagher, Andrew Gallagher, William Melvin, Robert Metlan,

Metlan, Charles Hipſon, and Michael Moran, and them or any of them ſo apprehended, you are to bring before me, or ſome other of his majeſty's juſtices of the peace for ſaid county. And for ſo doing this ſhall be your ſufficient warrant. Given under my hand this 18th day of February, 1786. Signed,

ALEX. O'MALLEY.

To all high and petty conſtables in ſaid county, eſpecially to *William Fulton* and his aſſiſtants, this to execute.

He alſo read

A warrant, ſigned Alexander O'Malley, dated 16th February, 1786.

County of Mayo } WHEREAS I have this
to wit. } day received information upon oath, of John Murphy of Drinanough in the pariſh of Killicommouge, barony of Cavan and county aforeſaid, on the 9th day of January, as the informant was lying in his bed in his own houſe, between the hours of eleven and twelve of the clock at night, he was greatly alarmed to hear both the doors of his ſaid houſe burglariouſly broke open at once, which was no ſooner done, than he perceived one of the party that ſo forced or broke open, the ſame advanced towards the fire, and thereupon taking a lighted or kindled turf, with which he lighted a candle that he had brought along with him, which was no ſooner done, than informants bed was ſurrounded by a banditti of armed men, namely, John Gallagher, Andrew Gallagher, William Melvin, Robert Metlan, Alex-

Alexander Mc Donnell, and Charles Hipſon, all of Caſtlebar in ſaid county, (which laſt mentioned Hipſon commanded the aforeſaid banditti), to ſeize informant, which they did accordingly, and dragged him moſt inhumanly out of his ſaid bed, each and every of them aiding, aſſiſting, and abetting one another.

That the aforeſaid Andrew Gallagher aided, aſſiſted and abetted by the aforeſaid banditti, did, then and there moſt wantonly, wilfully and felonioufly fire a ſhot from a piſtol loaded with gunpowder and leaden ſlugs, or leaden ſhot, called Swan drops, at informant, with an intention to take away his life, without aſſigning any reaſon whatſoever; which treatment they perſiſted in without intermiſſion untill they brought him into Caſtlebar aforeſaid. Upon which they brought him to the houſe or lodging of Patrick Randal Mc Donnell, into whoſe preſence they immediately conveyed him.

That the ſaid Patrick Randal Mc Donnell offered him a reward of 300l. ſterling, if he would ſwear or make affidavit, that George Robert Fitzgerald, Eſq; of Furlough, deſired or commanded him to fire a ſhot at him the ſaid Patrick Randal Mc Donnell; and finding that informant would by no means perjure himſelf for any reward whatſoever.

That he the ſaid Patrick Randall Mc Donnell did then and there make oath on the Holy Evangeliſt, that if informant did not ſwear or make oath, as he deſired him, that he would erect a gallows and hang him on the ſpot; at the ſame time

time calling for a rope, in order to perpetrate or put his wicked and felonious deſign in execution, which ſaid rope was brought unto him by Hipſon aforeſaid; on ſight of which informant, knowing by common report, that the ſaid Patrick Randal Mc Donnell was wicked and deſperate enough to hang him, was put into bodily dread and fear of his life, and more eſpecially as the ſaid Patrick Randal Mc Donnell is a juſtice of the peace. And did wickedly and felonioufly with a ſacred oath, threaten to hang informant; and the more ſo, becauſe informant well knew that the ſaid Patrick Randal Mc Donnell then did, and ſtill doth entertain and aſſociate with a numerous armed banditti, for the purpoſe of annoying the laws, to the great terror of the whole country.

Theſe are therefore in his majeſty's name, ſtrictly charging and commanding you the undernamed, on ſight hereof, to apprehend the body of Patrick Randal McDonnell, Andrew Gallagher, John Gallagher, William Robert Metlan, Alexander Mc Donnell, and Charles Hipſon, and them, or any of them ſo taken, you are to bring before me, or ſome other of his majeſty's juſtices of the peace for ſaid county, to be dealt with according to law. And for your ſo doing this ſhall be your ſufficient warrant. Given under my hand and ſeal, this 18th day of February, 1786.

Signed,

ALEXANDER O'MALLEY.

To all high and petty conſtables in ſaid county, eſpecially *William Fulton* and his aſſiſtants. This to execute.

The

The Rev. Mr. *Ellifon* was again examined.—He had frequently ſeen Mr. Bollingbroke write —a Paper was produced to him, it was ſigned by Mr. Bollingbroke.

The Clerk of the Crown by direction of the Court, then read a Warrant ſigned by JOHN BOLLINGBROKE.

County of Mayo } *By John Bollingbroke, Eſq; one*
to wit. } *of his Majeſty's Juſtices of the Peace for ſaid County.*

WHEREAS I have this day received information upon oath by Patrick Browne of Clougher, in the pariſh of Turlough, Barony of Carra, and County aforeſaid, that on the twelfth day of December inſtant, between the hours of ſeven and eight of the Clock at night, as this Informant was ſitting in a Houſe in Capparany, in the Pariſh of Turlough, Barony of Carra, and County aforeſaid, which Houſe his Maſter, George Robert Fitzgerald, Eſq; ordered him to take Care of, together with the Farm annexed to it, he was on a ſudden alarmed to ſee the Door of ſaid Houſe moſt forcibly and burglariouſly broke open by three Men, namely, Charles Hipſon, Cordwainer, John Keefe, and James Rafferty, Yeomen, all of Chancery Hall, in the Pariſh of Turlough, Barony of Carra, and County aforeſaid, which ſaid laſt-mentioned Rafferty had a lighted or kindled Turf in his hand, with intention to ſet the ſaid Houſe on fire, as Informant verily believes had he not been there; and upon entering ſaid Houſe, they immediately placed themſelves inſide of the Door with Guns and Piſtols in their hands, which they no

no ſooner had done, than the afore-mentioned Hipſon deſired his Comrade the aforeſaid Rafferty to bring him a Candle, which they had brought with them, and upon lighting ſaid Candle, they made a general Search, and finding nothing in ſaid Houſe, they told this Informant, that if they had met with any Arms the Property of George Robert Fitzgerald, Eſq; of Turlough, that they would have taken and carried them away. Informant further ſaith, that they put him in ſuch dread and fear of his life, that he abandoned ſaid Houſe next morning, and further ſaith not.

THESE are therefore in his Majeſty's name, ſtrictly charging and commanding you the undernamed Perſons upon ſight hereof to apprehend the Bodies of Charles Hipſon, John Keefe, and James Rafferty, and them or any of them ſo apprehended you are to bring before me, or ſome other of his Majeſty's Juſtices of the Peace for ſaid County, to be dealt with according to Law, and for you and every of you ſo doing, this ſhall be your ſufficient Warrant. Given under my Hand and Seal this 26th Day of December, 1785.

JOHN BOLLINGBROKE.

(Seal.)

To all High and Petty Conſtables in ſaid County, eſpecially to William Fulton *and his Aſſiſtants this to execute.*

Scot

Scot was again examined on the direct by Mr. Calbeck.

He was in the Houſe of Turlough, on the 21ſt of February, when Hipſon, Gallagher, and Mc Donnell, were going away; it was half paſt 8 when Brecknock came from his bed. Brecknock was not up when they went away, he might have been up before the witneſs ſaw him.

He was again croſs-examined by the Attorney General.

He came from Bengal, with Mr. Charles Lionel Fitzgerald, in the year 1771. He lived in the family ever ſince, there was no perſon preſent when Mr. O'Mealey ſigned the warant, but Mr. O'Mealey, Mr. Fitzgerald, and the witneſs; the witneſs brought a candle. One Paddy, Mr. O'Malley's Clerk, drew the warrant, he, the Clerk was not there. The Clerk wrote the warrants in the kitchen. When the witneſs brought in Fulton, Fulton put his own name in the warrant. Fulton writes a pretty hand. O'Malley ſwore Murphy, and Murphy put his mark to the warrant, both were done in the kitchen. O'Malley brought up the warrant and ſigned it in the Parlour. The warrants were given to Fulton by Mr. O'Malley, to execute. Fulton put them into his pocket. O'Mealey did not give them to Mr. Fitzgerald.

Second

Second Witneſs in the Defence,

Edward Dillon, Eſq; examined by Mr. Burke.

On the 20th of February laſt, he was near Ballyvara. He lay the night before at Mc Manus's, on his way from Caſtlebar to the county of Galway, where his own Houſe is. He ſaw a parcel of men on the Lands of Red-hills, with ſticks and weapons in their hands, he thought they might be in purſuit of a mad dog. He ſaw Mr. Fitzgerald, on the lands of Red-hills joining the bog. Mr. Fitzgerald's ſervant was along with him. After he met Mr. Fitzgerald, he made a ſhort way as the witneſs thought to Minola. The witneſs heard two or three ſhots, and was coming towards the Houſe of Ballyvara, when Mr. Fitzgerald, galloped up to him and ſaid, you had better not go forward, for they are firing out of that Houſe. He ſaw no ſhot fired from the Houſe of Ballyvara. He heard five or ſix ſhots fired. And on reflection he thought he muſt have been killed if he had gone through Ballyvara. He knew Mc Donnell and Gallagher, but did not know Hipſon.

To a queſtion from one of the Jurors.

Mr. Fitzgerald, did not appear to have been in diſguiſe, he had a brown coat on. As the witneſs believes, it was a ſurtout, wrapper or riding coat; and was ſuch as a gentleman might wear; He did not obſerve Mr. Fitzgerald to have any arms. Mr. Fitzgerald rode with a ſtick.

Third Evidence for the Defence.

The Rev. *Henry Henry*, examined by Mr. OWEN.

On the 20th of February he was at Mr. Fitzgerald's houſe at Turlough. He was there when Mc. Donnell, Gallagher, and Hipſon were brought there. He heard a converſation between Mr. Fitzgerald and the priſoners. The priſoners expreſſed a wiſh to know what was againſt them. Mr. Fitzgerald read a part of ſome papers which the witneſs believed to be warrants to them in the preſence of Mc. Donnell—Hipſon and Gallagher in an inſolent manner told Mr. Fitzgerald they did not regard his charges—Mc. Donnell expreſſed a wiſh to be brought before a Magiſtrate. Mr. Fitzgerald thought it unſafe to ſend them at night for fear of a reſcue—there were chairs offered to the priſoners. When the witneſs was at dinner he found the priſoners had been ſent up ſtairs. Mr. Fitzgerald ſent a meſſage to Mr. Mc. Donnell to know if he choſe any thing, and the anſwer which was given to Mr. Fitzgerald was that Mr. Mc. Donnell did not chooſe to eat any thing. The witneſs ſlept at Turlough—he was there when the account of the killing came to Turlough—Mr. Fitzgerald was at his own houſe when Mc. Donnell and Hipſon were killed—the witneſs was at Turlough when Mr. Gallagher was brought back there—he heard no directions relative to a reſcue—he ſaw the guard on the morning of the accident—he was ſtanding about the door with Mr. Fitzgerald—the witneſs roſe about ſun riſe, between ſeven and eight o'clock —Mr. Fitzgerald was up before the witneſs—the

witneſs

witneſs paſſed in and out of the houſe—he heard no directions given to the guard—the guard ſtood at the right hand of the houſe nearly oppoſite to it—he did not ſee Mr. Brecknock before Mr. Gallagher was gone—Mr. Brecknock to the beſt of this witneſs's knowledge was in his room, and to his, the witneſſes ſeeing, was not about the houſe.

He was croſs examined by Mr. Attorney General.

He ſaw the warrants on the table with Mr. Fitzgerald when he read them—he does not know from whoſe cuſtody Mr. Fitzgerald got them.

To a queſtion from one of the Jurors.

He knew Scotch Andrew—he ſaw him at Turlongh—he never was much with Mr. Fitzgerald—he ſlept there the night before the accident.

Fourth witneſs for the Defence.

John Love examined by Mr. Stanley.

He lives at Clantubberet—he remembers the 21ſt of February—he roſe by the break of day in order to meet his daughter, whom he had ſent for to Strabane, as he was going through the field called Gurtnefulla, he ſaw ſeveral men to the number of about twelve, near Gurtnefulla, they were walking inſide the wall. There was Terence Mc. Donnell and Patrick Randal Mc. Donnell's gardener, and ſome other followers of Mc. Donnell's inſide of the wall in the park. They were walking

walking backward and forward, and the witneſs hid himſelf behind a thorn buſh They were between him and the wall leading to the croſs roads. He was afraid of his life to go on. Some little time after he heard them ſay, if Mr. Mc. Donnell would come they would ſoon free him, by ſhooting Fitzgerald and ſome of his Northerns. At ſome conſiderable time after he ſaw them fire over the wall. There were high ſtones at the bottom of the wall on which they got, and laid their guns on the wall and fired. He heard murder cried on the road, the men who had done this had ſcattered themſelves down through a wood leading to Mr. Mc. Donnell's, and the witneſs went away faſter than he came and knew no more about it.

He was croſs-examined by the Attorney General

He lives at Clantubberet; it is an out ſcout of Mr. Fitzgerald's eſtate. He ſaw theſe men of Mr. Mc. Donnell's before ſun-riſe. He did not then number them. He went behind the buſh, and ſtaid there till it was light enough to number them—He was ſo frightened at ſeeing them that he hid. The buſh behind which he hid, was about ſeventy yards diſtant from them—He went there before break of day. He heard them ſay they would free Mc. Donnell, and ſhoot Fitzgerald and his Northerns—he ſaw them mount on the ſtones and ſhoot, and then ſcamper away—he did not go to meet *Miſſey* his daughter, who was to come from Strabane—ſhe did not come on account of this Rapparee buſineſs. He was ſure if he had gone on he would certainly loſe his life. He never returned to tell Mr. Fitzgerald and his men

men of the danger—he had no thought of any perſon but himſelf, and he took no precaution about *Miſſey* his daughter—he had come before when Humphrey George was taken up, to prove that he (George) was not on the guard of Gallagher and the priſoners, becauſe George was at Clantubberet, when he the witneſs returned at nine o'clock. He had lived ſixteen years in that country, and never was before a court in that time.

To a queſtion from one of the Jury.

The wind blew to the South-Weſt and it was pretty windy, the men were to the ſouth of him, the men could hide themſelves if they pleaſed, he never was nearer to them than ſeventy yards.

Fifth witneſs for the Defence.

Samuel Mc. Connell, examined by Mr. Burke.

He knew James Mc. Connell, he was his ſon, he is dead. Upon being aſked by Mr. Burke what was the cauſe of his death?

The Court interrupted Mr. Burke and told him that if it was only to prove this Mc. Connell was killed in this affray it was no part of the matter in iſſue and Mc. Connell was no further examined.

Sixth Evidence for the Defence.

Judith Kilgallin examined by Mr. Calbeck.

She lived at Turlough in February. She remembers the day that Mr. Mc. Donnell was ſhot. She

She was up early in the morning; ſhe ſaw Mr. Fitzgerald early; ſhe ſaw him frequently ſhe did not ſee Mr. Brecknock out of his room till after eight o'clock; ſhe did not ſee him and Mr. Fitzgerald converſe together; ſhe heard Fitzgerald direct the party to take the priſoners to Mr. Bollingbroke's, and to do nothing contrary to law.

John Scot was called again, and examined by Mr. Calbeck.

He knows the room where Gallagher, Mc Donnell and Hipſon were confined. He ſhut and nailed up the ſhutters, becauſe there was a broken pane in the window; the ſhutters were not opened until after the gentlemen went away; he was forced to open it with a hammer.

Judith Kilgallin was called again.

She knew the room where Mr. Mc Donnell and the other priſoners were. There was but one window in it. A piece was broken out of one of the panes, and part of the pane was in the window. The window ſhuts were ſhut and nailed, and not opened till the priſoners went away.

She was croſs-examined by Mr. Daly.

She made up the room in the morning, but not in the dark for there was a candle in it—Scot opened the window—ſhe was not told by any body what ſhe was to be examined, but the man who brought her told her Scot was examined twice.

Mr.

Mr. *Attorney General* ſtated to the Court, that he thought it neceſſary to rebut ſome part of the evidence that had been adduced upon the defence of Mr. Fitzgerald, reſpecting the warrants, and then called *Edmond Mc. Keal.* He ſaid that in February laſt he was in Turlough, he acted as clerk to Mr. Fitzgerald. [A warrant was then produced to him.] It was his, the witneſs's hand-writing, except the name William Fulton, which was not his hand-writing. He ſaw the warrants ſigned in Fitzgerald's parlour—Mr. Fitzgerald, Mr. O'Malley, Mr. Brecknock, Murphy and his wife, and Henry and the witneſs only were preſent—Murphy ſwore to two papers—they were not filled up when O'Malley ſigned them—[He was then ſhewed another warrant]—he wrote that paper alſo—there was no perſon preſent, but thoſe whom he had already mentioned when O'Malley ſigned the warrant—which was ſigned before the blank was filled up—[Another warrant was produced to him]—It was his hand-writing—[A fourth warrant was ſhewn him]—It was not his hand-writing—the warrants when ſigned were given to Mr. Fitzgerald—he did not know whether Fulton writes or not.

He was croſs-examined by Mr. Burke.

He was told by one James Mc. Donnell, he would be ſummoned—the witneſs ſaid that he might ſpare himſelf the trouble of ſummoning him as he would come of himſelf,—the witneſs put in the date in the parlour; he had ſeveral times came to Mrs. Fitzgerald to aſk her for his wages, he had got four guineas in part payment of the debt due to him,—the whole of his demand was 10l. 7s. 6d. Mrs. Fitzgerald promiſed him to pay the remainder,

der,—the witneſs had ſaid that he would be revenged on Mr. Fitzgerald.

Andrew Gallagher was again produced. He often ſaw Mr. Fitzgerald write,—he ſaw him write ſeveral times the 21ſt of February laſt. He believes the name William Fulton, inſerted in the blank to be the writing of George Robert Fitzgerald.

Seventh witneſs in the defence, Thady Murphy was examined by Mr. Stanley.

Is a priſoner for debt in the Marſhalſea of Caſtlebar,—he knows William Kelly; he ſaw him in gaol in Caſtlebar. The witneſs heard Kelly ſay on ſome quarrel with the gaoler, that he wiſhed that he had broke the gaoler's neck for hindering him to go among his friends; and he was ſorry that he had gone againſt Mr. Fitzgerald; for he was a good landlord, and he would not for twenty guineas that he had.

Eighth witneſs for the defence, Richard Moore was examined by Mr. Owen.

He is a priſoner in the Marſhalſea of Caſtlebar,—he heard William Kelly ſay, that he would not wiſh for twenty pound or twenty guineas, that he had any thing to ſay to the affair between Mr. Fitzgerald and Mr. Mc. Donnell.

Ninth witneſs for the defence, examined by Mr. Calbeck.

He is a priſoner in the Marſhalſea of Caſtlebar,—he knew Kelly, he had ſeen him in the priſon; he heard him ſay he was not ſatisfied with what he had done, and that he would not for twenty guineas that he had done what he did.

Here the defence cloſed.

The *Lord Chief Baron* then proceeded to charge the jury to the following purport: That the prisoner, George Robert Fitzgerald ſtood indicted with another, for having of h*is malice prepenſed, wilfully and traitorouſly, provoked, ſtirred up, and procured*, Andrew Creag and others, to ſlay and murder one Patrick Randal Mc'Donnell, in the very words of the ſtatute of the 10th of Henry VII. and the indictment proceeded to aver, that a murder was actually committed on the ſaid Patrick Randal McDonnell, by means of the provocation, ſtirring up, and procurement of the ſaid George Robert Fitzgerald.

There was alſo another indictment againſt him of a ſimilar nature, for the provocation, ſtirring up, and procurement of the murder of Charles Hipſon.

The whole was but one tranſaction, and the evidence went to both the indictments; a great part of what had been ſtated in evidence on the table, had been merely introductory—a great part of it was not material, and drawn forth, not by the examination of counſel, but from the eagerneſs of the witneſſes. He would endeavour to ſelect ſuch parts of it as appeared to him applicable to the caſe before the jury, and was happy to find that ſome of them had themſelves taken notes.

The *Chief Baron* then went thro' the material parts of the evidence except that given by Andrew Craig, which he did not recapitulate, but ſaid he would leave entirely to the jury ſubject to this obſervation, that being indicted for the ſame offence himſelf, and a principal actor in it, he had ſworn with a halter about his neck, and therefore his evidence ought

not to be lightly received, but weighed in the ſcales of probability, even to a ſcruple, and no further believed than as the evidence of other witneſſes, where they ſwore to the ſame facts, confirmed it, or where he was the ſingle witneſs, rendered it probable. He ſaid that to convict the priſoner of the offence laid in the indictment, it was neceſſary firſt to prove that a murder was committed by perſons named in the indictment or ſome of them; next that they acted by the procurement of the priſoner. That it was proved that two homicides were committed, and committed by ſome of the perſons charged on the indictment, with that fact; for all thoſe who were named by the witneſſes to have been in the guard, when that fact was committed, were part of the fifteen or ſixteen charged in the indictment. But whether theſe homicides amounted to murder would depend partly on evidence, and partly on matter of law; that if they believed the evidence for the crown, the perſons who compoſed the guard had directions to ſhoot and make ſure of their priſoners, if there was even the colour of a reſcue; that there was in truth no reſcue or attempt to reſcue, but merely a ſhot fired by one of their own body to give the appearance of a reſcue, and that thereupon Hipſon, though bound with cords and unable to reſiſt or eſcape, was ſhot dead upon the ſpot, and Mc'Donnell ſhot in the arm, and when lying on the bridge helpleſs and unreſiſting, diſpatched. The priſoner indeed attempted to juſtify theſe homicides, by proving an endeavour to reſcue by ſome friends of the deceaſed. What credit John Love, who gave an account of this tranſaction, to which he was the ſingle witneſs, deſerved, he muſt leave to the jury: but ſuppoſing, according

to

to the evidence of that witneſs, that twelve men had actually came and fired upon the guard, were they therefore to kill their priſoners? certainly not. They might *perhaps* be juſtifiable in killing the aſſailants but not in killing their priſoners, who neither joined in the reſcue nor made the leaſt attempt to reſcue. He conceived, that to kill priſoners charged with a miſdemeſnor or arreſted by civil proceſs in caſe of flight or reſcue, would be murder or manſlaughter, according to the circumſtances; and that the killing a priſoner even under a charge of felony, could not be juſtified, but where his own flight or reſiſtance was attended with circumſtances which ſhewed that he could not be otherwiſe overtaken or ſecured. The killing ſhould not appear to be a wanton killing, but founded in neceſſity for the execution of the law, and the advancement of juſtice.—But what was the charge againſt the priſoners here; the word felonioufly is introduced into two of the warrants, tho' the fact ſtated in them does not amount to felony. They are both ſigned on the ſame day; and, to the ſhame of the commiſſion of the peace! by the ſame magiſtrate, for the ſame fact, and purpoſe; the one clearly ſupplemental to the other. It was with reluctance that he obſerved upon another warrant, by another magiſtrate, that the word *burglarioufly* appeared upon the face of it, tho' upon inſpection; the entry charged as a crime upon the warrant, was not done with any felonious intent, and ſuch an intent muſt always appear, in order to conſtitute that crime which is denominated *burglary*. The whole ſeemed one connected plan, to give a colourable foundation for the killing of the priſoners: he meant Hipſon and Mc Donnell; and he had no doubt but that in point of

law

law, that killing under all the circumſtances of the caſe amounted to murder. It was moſt neceſſary to ſhew, that the perſons who committed this murder, acted by the procurement of the priſoner; and of this there was abundant evidence, if they believed it.—Evidence of a plot laid by the priſoner againſt the lives of the deceaſed and Gallagher; a plot to take away their lives under colour of law; —charges of felony introduced into warrants when no felony appeared to have been committed; —a law-book produced by Brecknock, and a paſſage red out of it by the priſoner, to ſhew that it was lawful to ſhoot a priſoner charged with felony, in caſe of a reſcue.—Evidence of great joy expreſſed by him when the unhappy men were taken under theſe warrants. Evidence of directions given by him to be ſure to kill them if there was even the colour of a reſcue. Evidence of a ſham reſcue contrived by the priſoner for the purpoſe. The deceaſed killed under colour of this reſcue.—Evidence of great diſſatisfaction expreſſed by him at the eſcape of one of the unhappy victims. And the horrid expreſſion of "*dead men tell no tales.*"—All this and more had been laid before the jury, and was ſufficient if they believed the witneſſes upon whoſe credit it was their province to decide, to bring the charge of procuring the murder to be committed, home to the priſoner.

He then obſerved upon the evidence of ſome witneſſes examined by the priſoner, to impeach the credit of the witneſſes for the crown. Whether the evidence of thoſe witneſſes contradicted that of the witneſſes for the crown, in points ſo material, as utterly to deſtroy the credit of the latter, he muſt leave to the jury to determine. Upon the whole, if they believed the witneſſes for the crown, they ought to find the priſoner guilty; and if not, they ought to acquit him.

Baron

Baron Power. If this were a mere queſtion of fact, unincumbered with law, he ſhould not trouble the Jury with one obſervation; but, as a queſtion of law of importance to every ſubject, and which ſeemed not to be well underſtood, was involved in the general queſtion for the conſideration of the Jury, he would ſtate what the law was, calling upon the learned counſel for the priſoners, to ſet him right if he miſtated any one rule or principle of law.

The crime of murder, he obſerved, had been made high treaſon in this kingdom ſo long ago as the 10th year of King Henry VII. not as ſome ill informed hiſtorians ſuppoſe, becauſe murder was then more frequent in Ireland than in England, but becauſe the benefit of clergy was then allowed in murder both in England and Ireland, and as it was found no eaſy matter in England to exclude murder from this privilege, (for it was not until the reign of Henry VIII. and Edward VI. that in England any but the unlearned, who leaſt knew the nature of the crime, were capitally puniſhed for murder) the legiſlature in Ireland declared murder to be high treaſon, to which the benefit of clergy never did at common law extend.

Murder being then made high treaſon in Ireland, this rule of law muſt neceſſarily have followed that " every act which in felony made men acceſſaries, will in high treaſon, make them principals " but the legiſlature not content with this derivative treaſon, expreſsly declares—that if any perſon ſhall of malice prepenſe *provoke*, *ſtir*, or *procure* any perſon to *murder any of the King's ſubjects*, he ſhall be deemed a traitor attainted of high treaſon, as if he had been guilty of treaſon againſt the King's perſon—it is on this part of 10 H. VII. the Priſoner at the bar ſtands indicted.

indicted. And the indictment very properly alledges the murder to have been committed. Thus the crime of murder, and that of procuring it to be committed, is made one and the ſame crime; whereas if the procuring murder remained an acceſſorial offence, it would not in conſideration of law be the ſame offence as murder, becauſe the offences of principal and acceſſory ſpecifically differ.

Out of this charge, he obſerved, two queſtions muſt ariſe; it being confeſſed on both ſides that an homicide was committed.

Firſt, was the homicide murder? or was it manſlaughter, or juſtifiable, or excuſable homicide?

Secondly. Did the priſoner *provoke, ſtir, or procure* any of thoſe perſons named in the indictment to kill Mr. M'Donnell?

If, from the evidence the homicide be not murder but manſlaughter, or juſtifiable or excuſable homicide, there will be an end of the preſent indictment againſt the procurer; the priſoner cannot be ſaid, to have procured that to be done, which never was done. With reſpect to the evidence, he told the Jury, that whether the matters of *fact* alledged on the part of the priſoner, either as a juſtification, excuſe, or alleviation, be true or not, was the proper province of the Jury, and of the Jury only; but whether, if true, the homicide be juſtifiable or not, was the province of the court. That an homicide was committed was confeſſed on the part of the priſoner: but that the perſons who committed it were guilty of murder, is denied; and though they were guilty of murder, it is denied alſo that the priſoner did provoke, ſtir up, or procure any perſon to commit that murder.

With

With reſpect to the firſt queſtion, whether thoſe who committed the homicide were guilty of murder or not—he obſerved, that the *juſtification* ſet up, on their parts, was this—that M'Donnell, Hipſon, and Gallagher were priſoners in cuſtody of the law, charged with a criminal offence—that a reſcue was attempted by or on the part of the priſoners—that M'Donnell and Hipſon were ſhot in conſequence of that reſcue, and the homicide juſtifiable.

The ſecond queſtion was a mere matter of fact, proper only for the Jury to determine; it was ſworn by three witneſſes that he did procure ſome of thoſe perſons to commit the act, but whether thoſe witneſſes deſerved credit, they (the Jury) were the only Judges—he ſhould only obſerve, that if any of them deſerved credit, there was ſufficient evidence in point of law to ſupport the bill of indictment.

The juſtification he ſaid, involved two queſtions:

The firſt, a queſtion of *fact*. Whether a reſcue was attempted, by or on the part of M'Donnell and Hipſon?

The ſecond. Suppoſing a reſcue was attempted, whether under all the circumſtances of this caſe the homicide was juſtifiable? And here he ſtated that, from the nature of the defence, it could not be excuſable homicide, either on the principle of miſadventure or ſelf-defence; neither could it be manſlaughter, becauſe if no malice, expreſs or implied, appeared in this caſe, it would be juſtifiable homicide—it muſt be juſtifiable homicide, or it is murder.

In conſidering the firſt queſtion, whether a reſcue was attempted or not? he would only ſay, that the Jury

Jury ſhould reflect on the relative ſituations of the perſons alledged to have attempted the reſcue, and thoſe who were appointed to guard and conduct them. Hipſon and Gallagher were tied together, and M'Donnell on Horſeback, with his horſe led by a man armed—thus *three* men *unarmed*, guarded by *twenty* or *thirty* men all in *arms*, (twenty was the number ſworn to by Craig) are ſaid to have attempted a reſcue. And with reſpect to the evidence of Love, who ſwore that he heard a party ſwear they would reſcue Patrick M'Donnel, what does he ſay? that the moment after they had diſcharged their firelocks, without the leaſt attempt on their parts to effect their avowed purpoſe, they ran away. The probability of ſuch evidence as that of Love, when the Jury came to weigh the firſt queſtion would, he ſaid, well deſerve their conſideration.

The next queſtion, (a mere queſtion of law) was whether, ſuppoſing a reſcue was attempted by or on the part of M'Donnell and Hipſon, the homicide can be juſtified? Before he ſtated what the rule of law was, he was bound to obſerve, that ſeveral ſtrong objections were made by the *Attorney General* to the warrants under which M'Donnell, Hipſon, and Gallagher were arreſted; but, if the priſoner had failed in proving the juſtification, whether theſe warrants were illegal or not, would ceaſe to be a neceſſary object of inquiry; he would therefore conſider the juſtification.

Suppoſing then a reſcue to have been attempted, the rule of law in every ſuch caſe, he ſaid, was this, where any perſon having authority to arreſt or impriſon, uſing proper means for the purpoſe, is reſiſted, and the party reſiſting is killed, it is juſtifiable homicide. So, if a felon attempts to fly from juſtice,

tice, and in the purſuit the party flying is killed—*where he can't be otherwiſe overtaken*—it will be juſtifiable; but, in both caſes, it muſt appear that there was an *apparent abſolute neceſſity* on the officer's ſide—it muſt appear that the priſoners could not be detained in cuſtody unleſs ſuch homicide was committed; and if ſuch apparent neceſſity does appear in this caſe, it will not be murder in the officers, it will be juſtifiable homicide—the officers were then guilty of no fault, not in the minuteſt degree.

What evidence then is there of any ſuch apparent abſolute neceſſity? might not the priſoners have been detained in cuſtody, without committing the homicide? twenty men armed, guarding three priſoners unarmed and tied, are attacked by twelve men who fire over a wall, but immediately fly and run away, what neceſſity was there to fire at the priſoners then in cuſtody? they were unarmed, and it is not pretended they attempted to fly until they were fired at. No abſolute neceſſity therefore appeared in evidence to juſtify the homicide, and in ſuch caſe he was bound to declare, that it was murder in the officers who fired, and all who were preſent, aiding and aſſiſting. But if any doubt remained on this part of the caſe, he ſaid it would well deſerve the conſideration of the Jury, whether upon the whole of the evidence, this tranſaction did not appear to be an artful device and contrivance to take away the lives of the deceaſed under colour of law. If it did, it was murder in all who were privy to the tranſaction, murder highly aggravated—if murder was capable of aggravation. Such a ſcheme, he ſaid, carried with it internal evidence of cool and deliberate malice, and, in point of law, it was murder in all who were privy to, and carried the plan into final execution; but this caſe,

he obſerved, did not reſt on implied malice; evidence of expreſs malice was given.

Upon the whole, he ſaid, that it was to him clear, that the juſtification inſiſted on the part of thoſe who committed the homicide, could not be ſupported by any rule or principle of law—thoſe who committed the homicide were therefore guilty of murder; but it remained for their conſideration, whether the priſoner did *procure, ſtir up, or provoke*, any of the perſons named in the indictment to commit the murder? that was a queſtion merely for the conſideration of the Jury, from the court they were to expect no opinion, it depended on the evidence, and the credit due to the witneſſes, of which they (the Jury) only were the judges; if they were fully and clearly of opinion, that he did, and that the murder was accordingly committed, they could have no heſitation in finding him guilty; but on the contrary, if they did believe that no murder was committed, or if committed, that the priſoner at the bar did not procure, provoke, or ſtir up, (to uſe the words of the ſtatute) any of the perſons named in the indictment, to commit the murder, then they were bound to find him not guilty.

The Jury returned in about fifteen minutes, and brought him in GUILTY, in both numbers.

Mr. Fitzgerald was then remanded.

Adjourned till to-morrow at eleven o'clock.

The Court roſe at twelve o'clock at night.

SAT-

SATURDAY, JUNE *the* 10th.

The Court ordered up all the Priſoners except Mr. FITZ-GERALD *and* Mr. BRECKNOCK; *and they being brought up and having agreed to join therein, were by the Clerk of the Crown directed to look to their challenges; and after ſeventeen peremptory challenges made by them. The following Gentlemen, were ſworn on the petit Jury.*

Thomas Samuel Lindſey, of Milford, Eſq.
Peter Lynch, of Caſtlecarra, Eſq.
Thomas Lindſey, Jun. of Hollymount, Eſq.
John Bingham, of New-brook, Eſq.
William Ouſley, of Ruſh-brook, Eſq.
Bartholomew French, of Rock-field, Eſq.
Arthur Lindſey, of St. Audreys, Eſq.
Thomas Ormſby, of Ballinamore, Eſq.
Martin Kirwan, of the Grove, Eſq.
Edmond Gildea, of Weatherforth, Eſq.
Joſeph Lambert, of Togher, Eſq.
Courtney Keney, of Ballinrobe, Eſq.

THE Clerk of the Crown then gave in charge to the Jury; James Foy, John Fulton, John Cox, James Maſterſon, David Saltry, otherwiſe Simpſon; Phillip Cox, William Fulton, Archibald Ewing, otherwiſe Newing; John Berny, Humphry George, Michael Brewin, Jn. Rehanny, William Robinſon, Wallace Kelly, and David Simpſon, from a note on the Crown Book for that they on the 21ſt of February, in the 26th of the King, at Kilnecarra, did traitorrouſly and

felonio[illegible]ly

felonioufly kill and murder Patrick Randall M‘ Donnell, they were alfo given in charge for the murder of Charles Hipfon.

Mr. ATTORNEY GENERAL *ftated the cafe.*

Firft Witnefs on behalf of the Profecution.

Mr. *Andrew Gallagher examined by* Mr. *O'Hara*.

He was in Turlough Houfe, on the 20th of February. The witnefs was brought out on the 21ft. with Patrick Randal M‘ Donnell and Charles Hipfon, who are both dead. He faw a great number of perfons affembled before the Houfe, before he came down. James Foy, William and Wallace Kelly, Patrick Dornin, one Chapman, one Saltry, Archibald Ewing or Newing; Macbrue, John Berney, Humphry George, John Renchy, David Simpfon, and all the people mentioned in the indictment except Maftерfon and the two Coxes. He was brought down tied by Fulton. He was tied with a fmall cord which the weaver's call thrums. He was tied together with Hipfon. Mr. M‘ Donnell was led out by the party. They were all armed. Every man of the party had a Gun except William Fulton, who had a Blunderbufs. He heard directions given to James Foy and Andrew Craig, to move the guard up higher, and to tell them if any refcue was attempted, to fhoot their Prifoners. He faw Foy and Craig go up to the party, and heard Andrew Craig give the directions. He faw Foy fpeak but whether

whether he gave any directions he did not know. They proceeded towards Ballyvara, Foy remained with Mr. Fitzgerald. When they had got about forty yards on, Mr. Fitzgerald cried holla! Andrew Craig called to the party to ſtop, Foy then came up and ſpoke to Craig for about five minutes. The party were then ordered to march, Foy came with them for ſome diſtance. The witneſs perceived a buſtle in the rear and heard a ſhot fired, and Andrew called out "kill the Priſoners". His apprehenſion had made him look back: John Fulton was there. He wore a white coat faced with blue. David Simpſon was there. For he at that time thought him the talleſt man he had ever ſeen. Dornin was there. He could not ſay whether in conſequence of that ſhot, that any body was killed; but he thought that Mr. Mc Donnell was wounded. There was no general volley, but they fired in ſucceſſion. More than three parts of the party fired. Hipſon was killed by one of the ſhots. There was no reſcue or attempt of a reſcue. There was a number of ſhots fired after the witneſs when he fled. One he believed was fired out of a Blunderbuſs. It frightened him much, it tore up the ground in a very remarkable manner. He thinks it was fired by Fulton. He was wounded by a ſhot fired by M‘ Connell. M‘ Connell is dead. He believes the man who hit M‘ Connell was Dornin. In about eight or ten ſeconds after the witneſs had thrown himſelf into the ditch, he got up over the wall, and ſaw John Cox, and James Maſterſon about the dead body. He ſaw William Robinſon riding upon a grey-nag, towards where the dead body was. The witneſs was diſcovered and brought out.

(Here he ſhewed to the Court and the Jury the Stocking which Mc Donnell wore, when he was formerly

formerly wounded in the Leg, and he alſo ſhewed the Coat which he himſelf wore on the day of the Murder.)

More than twenty ſhots had paſſed through his Coat. He begged his life from Wm. Maſterſon, in the moſt moving terms he was capable of. He was told they muſt bring him to Turlough. William Fulton was for having him diſpached inſtantly, Oh! ſays he, you were a great man yeſterday, and pointed his blunderbuſs at the witneſs. The witneſs leaped behind Cox to preſerve himſelf. They brought him back to Turlough. When he was diſcovered Simpſon was not there. James Maſterſon fired a ſhot at him, which came within a few inches of his face on the day of the twentieth at Ballyvara. He did not ſee Foy after he had ſeen him converſe with Scotch Andrew, until he ſaw him on his return to Turlough. Mc Donnell, or Hipſon, or himſelf had no arms, nor made any kind of reſiſtance.

(Here he ſhewed the cloths which were worn, that day, by Mc Donnell. They were much torn by balls, and a great effuſion of blood upon them; he alſo ſhewed the ſaddle which his Mc Donnell's mare had on that day, the pummel of which was perforated by a brace of balls.)

He did not ſee Cox or Maſterſon join the parties: but he ſaw them over the dead body, when he was brought out of the field, where he had concealed himſelf.

He was Croſs examined by Mr. Burke.

Pat. Randal Mc Donnell was conſidered as a very peaceable man by all people, except thoſe whom he

he was concerned with in law matters.—Pat. Randal Mc Donnell was indicted for ſhooting out of a blunderbuſs at George Robert Fitzgerald, and lodging ſhots in him—but he was acquitted.—It was ſeven o'Clock in the morning when the witneſs was brought down ; there was a light wind. —There were a great number about the houſe when the guard was called out.—The witneſs was in great terror and confuſion, he expected death from ſeven o Clock in the morning, until two o'Clock, when the people came to Turlough with Mr. Elliſon.—He conſtantly looked out of the window, except once, when Fulton was going out of the room, that he looked after him.—The reaſon of his looking out was to ſee if he had any friend among the guard, or whether any one of them looked like an honeſt man. Philip Cox had no gun. He believed John Cox was very ſorry to have ſeen him in that condition. He was the laſt of the guard when they were drawn up before the houſe. The guard were diſtant from the houſe about the ſpace of the breadth of the road. The reaſon why he heard Craig, and not Foy, was, becauſe one ſpoke louder than the other. He was brought down immediately. He knew every one of the priſoners at the bar. He knew the faces of the principal part of the guard. He ſaw Foy afterwards for a part of the way, but afterwards did not ſee him until they met again at the houſe of Turlough. The witneſs was at the front of the guard, and always expected to be ſhot, and turned about conſtantly. When he turned his head back and heard the ſhot ; he heard a buſtle and looked back, he then heard a ſhot, not the reſcue ſhot, but in about two ſeconds after it ; for as ſoon as Andrew Craig cried " a reſcue," two ſhots were diſcharged, " pop" " pop," and then three or four ſhots ; the ſhots were diſcharged

charged very nearly as close to each other, as a man could in quick succeſſion clap his hands. When the witneſs came over the wall, Cox and Maſterſon ſeemed very ſorry for his ſituation. Fulton pointed a blunderbuſs at him. He ſaid he could form no belief whether the blunderbuſs was charged or not: but being preſſed to form a belief; he rather believed it was charged, for he had time to have charged it, and fired it a dozen times, in the ſpace which had paſſed from the time when the witneſs ſaw it diſcharged. As the witneſs lay in the ditch, he heard all the party crying, God damn him the vaillain to Mc Donnell, he will make his eſcape.

Second Witneſs for the Proſecution.

WILLIAM KELLY *examined by* Mr. PATTERSON.

He was appointed of the guard, on the 21ſt of February, to guard Hipſon, Mc Donnell and Gallagher. He received inſtructions from Mr. Fitzgerald. He was deſired to take the priſoner to Mr. Bollingbroke, and to fire at and ſhoot them if a reſcue attempted. He received directions from Andrew Creig to the ſame effect. James Foy gave no directions in his preſence—The party met no oppoſition from Gallagher, Mc Donnell or Hipſon; nor did Mc Donnell, Gallagher or Hipſon attempt to fly. About a quarter of a mile from Turlough, the witneſs heard a ſhot, and he heard Andrew Creig cry out, "A reſcue, "mind your priſoners." Two ſhots were then fired; theſe two ſhots were fired by Andrew Creig and John Fulton, as he believes. He does not know any other men that fired. He does not know

know whether John Mc'Mullen was of the party or not: he ſaw two men fall by the ſhots fired, and theſe two were Gallagher and Hipſon, and Mc'Connell alſo was then certainly ſhot: he heard no ſhots fired but two, but if three or four ſhots were fired together, it would be impoſſible to diſtinguiſh them. It was from the party ſent by Mr. Fitzgerald that all the ſhots came—he ſaw Mr. Mc'Donnell after the ſhots fired, and his mare leaped about, and Mr. Mc'Donnell cryed out, murder! and the mare carried Mr. Mc'Donnell on to Kilnecarra-bridge—the witneſs ſaw Mc'Donnell afterwards on the bridge of Kilnecarra—he was lying on one ſide, and the arm which was uppermoſt was whole: there was a man ſtanding on the bridge with a hatchet in his hand. The witneſs knew very few of the men who were of the guard—he was a ſtranger—Andrew had ordered him to go ſtraight forward and not to look back at all. When he ſaw Mc'Donnell on the bridge, the witneſs cried to Scotch Andrew, "Ah murder! Andrew, do not hurt the gentleman any more;" to which Andrew replied, by ſwearing by the moſt High, that he would drive the contents through his ſoul. James Foy was not of the guard—John Cox was not of the guard—James Maſterſon was not of the guard—Phillip Cox was not of the guard—William Fulton was of the guard—John Fulton was of the guard—he believes David Saltry was not of the guard, but he might be of it without his knowledge. Archibald Ewing was not, of his ſeeing, of the guard. John Rehemy and David Simpſon were of the guard.

Third Witneſs for the Proſecution.

Andrew Craig was called on the table, and Mr. *Stanly* objected to his being admitted to give teſtimony. He ſaid he was ſorry it did not fall to his lot to object to this man's being examined in an earlier ſtage of the proſecution. He did not mean to contend, that a perſon indicted was not a competent witneſs for the Crown—but moſt certainly the admitting or not admitting approvers by the old law was a matter of ſound diſcretion; and there were certain rules and principles which governed that diſcretion, which ought now to prevail and guide the diſcretion of the Court in the modern practice, of admitting or rejecting accomplices as witneſſes for the crown. It appeared judicially to the court, that Andrew Craig is indicted for the murder, and that he was the very principal, who, with his own hand, had committed the murder. In the old law of approvement, which is out of uſe though not out of force, there are certain rules and principles in admitting or rejecting perſons offering themſelves as approvers, which ſtill do, and muſt prevail, and ever ought to guide the diſcretion of the Court, in admitting or rejecting a King's Evidence. That diſcretion ſhould be a ſound diſcretion, regulated and governed by principles of ſubſtantial juſtice, legal diſcernment and ſound policy. If it is not abſolutely neceſſary for the execution of the law againſt notorious offenders, that accomplices ſhould be admitted as witneſſes, the practice of admitting

admitting them in any cafe is liable to great and ſtrong objections. The law of approvement in analogy, to which the modern practice of admitting King's evidence has been adopted, is ſtill in force, and is very material, and ought to be the rule to guide the diſcretion of the Court. By that law, a perſon offering himſelf to be an Approver, muſt be one indicted of the offence, and in cuſtody on that indictment. He muſt confeſs himſelf guilty of the offence, and deſire to accuſe his accomplices; after which the Court aſſigned him a Coroner, before whom he made his confeſſion, and after his Appeal was put into form, he was obliged to return into Court, and repeat his Confeſſion; and if he varied in a ſingle circumſtance, even in the colour of a horſe, or in any trivial circumſtance, ſo nice was the law, that the Court rejected him, and he was condemned to be hanged. So the Appellee had a right to make many *legal exceptions* to the perſon of the Approver, and if it appeared he was the very *Principal that committed the fact*, the Court refuſed and rejected him as an Approver. My Lord Mansfield lays it down in the caſe of the King againſt Margaret Caroline Rudd, in Cooper's Reports, that the modern practice of admitting accomplices as King's evidences has been adopted in analogy to the old law of Approvement. And that the ſame rules and principles prevail in the one that did in the other. And therefore as it appears that Andrew Craig, who now offers himſelf as a King's evidence, was the very Principal that with his own hand committed the murder, the Court ſhould reject him; particularly, as another accomplice had been already

already admitted as a witneſs for the Crown; and in confirmation of this doctrince, every act of ſtate, every royal proclamation offering a reward and pardon to accomplices for diſcovery of their Partners in guilt, has an expreſs exception to the perſon who actually commits the fact.

The *Chief Baron* ſaid, the only queſtion was, "is Craig a competent witneſs or not?" and there is no queſtion better ſettled in the books of Crown Law, than that a man ſhall be a competent witneſs, notwithſtanding his being indicted and arraigned; and it has even been doubted, whether he be not competent after conviction, and till attainder.

Mr. *Baron Power*.—It is no doubt a great objection to the credit of Andrew Craig that he has been indicted for the ſame offence, but he has been received as a witneſs yeſterday, and unleſs the Court will try him upon the indictment againſt him, and which he (the Baron) after his having been received as an evidence, would certainly not conſent to; he could ſurely refuſe to hear his teſtimony. Clearly it was a ſtrong objection to his credit, and that will be eſtabliſhed by the nature of his teſtimony, and how far it is corroborated by other evidence.

The Court then over-ruled the objection, and *Andrew Craig* was examined by Mr. *Daly*.

He was employed by Mr. Fitzgerald to go along with the men the day Mc. Donnell, Hipſon, and Gallagher were taken from the Houſe of Turlough

Turlough towards Mr. Bolingbroke's. He believed David Simpſon had arms, he was ſure he had; John Fulton had arms, William Fulton had arms, John Rehenny had arms, Archibald Ewing had arms, Michael Berny had arms. Berny joined them at the Shoemaker's houſe. He could not take upon him to ſwear, whether Wallace Kelly was there or not. Berney joined them, but was not preſent at any ſhot, but the one ſhot fired by the witneſs himſelf.

[Here Mr. *Gallagher* interrupted and ſaid, Mc. Brue was not upon the guard, and the *Chief Baron* on referring to his notes, found his name, as mentioned by Gallagher, and told him ſo. And Gallagher ſaid, that if he did mention him, as being upon the guard, it was a miſtake; for what he intended to have ſaid was, only that he knew Mc. Brue; but that he was not upon the guard.]

Craig then went on with his evidence.

Foy was not there: there was a meſſage delivered to him by Foy ſhortly after his leaving the houſe at Turlough; but *he* was not of the guard. The meſſage delivered by Foy was, "that he (the witneſs) had laſt night made a motion to ſave Andrew Gallagher, but it muſt not be. There were three guns preſented at him, when Mc Donnell faced the guard; but he cannot ſay by whom, but to the beſt of his recollection, Fulton was one of them. The witneſs gave the word a *reſcue!* immediately after the reſcue ſhot.

He was croſs examined by Mr. Stanly.

He lived with Mr. Fitzgerald three quarters of a year in Turlough, all the party were neighbours within a mile, and a mile and half of Turlough; He received orders from Mr. Fitzgerald to bring in the people of the villages; he brought as many as he could bring; he could not tell how many; he knew John Fulton, becauſe he had brought him with him to Chancery Hall. He was ſure Simpſon had arms. When he made uſe of the words "he believes" in his direct teſtimony, and not the words "he was ſure," He thought they were the ſame ſentiments. Maſterſon he knew to be a carpenter, and he believed if he was there he muſt have ſeen him.——The witneſs was in the rear, the firſt ſhot was from the inſide of the wall. It was hard for him to mind what was done for it was a horrid thing to ſee a man murthered, he cannot tell the name of the man who fired the firſt ſhot, but he believes it was Nelly or Lelly. He was terrified much when he heard the firſt three ſhots. He was ſure Mc. Mullen fired the next ſhot, becauſe he was looking at him when he fired it, it was Mullen's ſhot that put him in that ſtate of terror; Mullen's ſhot was the firſt ſhot fired by the guard after the *reſcue* ſhot was fired. The third ſhot that was fired was Chambers's. He did expect that things would be better with him than if he had not given this evidence. He did not know whether he ſhould get a pardon or not. He had been told by common people that he would be ſaved by what

what he would ſay, but he had not been told ſo by people of any conſequence. William Robinſon was not on the guard.

To a Queſtion aſked by one of the Jurors.

He anſwered that Berney came only from the ſhoemakers to the bridge, but he had a gun in his hand. He believed Saltry was not upon the guard.

Here *Gallagher* interrupted, and ſaid he knew that Saltry was there, for he knew his voice, and heard him ſpeak when *he* was hiding, and ſo he had given evidence yeſterday. *Craig* in continuance ſaid he was not of the guard which he had choſen, nor of it when they left Turlough, but he might have heen of the guard without his (the witneſſes) knowledge. The guard returned to Turlough, and he, the witneſs, was the laſt of the guard but two or three. He told the guard that Mr. Brecknock had pointed out a law whereby it was declared, That it was lawful to ſhoot perſons attempted to be reſcued, and that they were to ſhoot the priſoners *Dead! Dead!* by his maſters directions.

Here *Simpſon* begged leave to aſk the witneſs a queſtion, to which Craig anſwered, that he (Simpſon) was not in the plot, and that he did not know any thing but that it was a real reſcue. John Fulton, Chambers, Mullen, and himſelf were only in the ſecret; William Fulton was not in the ſecret, nor did he fire any ſhot to the witneſſes knowledge; the witneſs knew that Mr. Fitzgerald would notlet William Fulton into the ſecret: There

There were none in court who were in the ſecret except John Fulton.

Fourth witneſs in behalf of the Proſecution.

Rev. *Thomas Thompſon* examined by Mr. *Attorney General*, he knew Andrew Craig to have made confeſſion—there were no promiſes made to him. He had heard him make a verbal confeſſion to the witneſs as a clergyman. His written confeſſion was voluntary. There were never any hopes of life given to him. On the contrary he recollected going to tell him from Mr. Cuff, that he did not hold out any promiſes of pardon to him. That he had applied to the Attorney General and that the Attorney General had directed him to prepare Craig for death. He exhorted Craig to pray, and he never made any variance from the confeſſion that he firſt made to the witneſs.

He was croſs examined by Mr. BURKE.

He ſaid it was his duty as a clergyman to attend upon him.

The Rev. *Thomas Elliſon examined by Mr.* O'HARA.

He had taken a confeſſion of Andrew Craig's ſome little time before the laſt aſſize. The gaoler had told him that Craig wiſhed to ſee him, Mr. Cuff, and James Browne; and that he had ſomething

thing to tell them, but he would tell nothing 'till they were all preſent. He made a confeſſion afterwards before theſe gentlemen. The witneſs ſince took his information. The information and confeſſion correſponded with the evidence given by Craig upon the table yeſterday.

Here the Proſecution was cloſed.

On behalf of the Priſoners, the firſt witneſs produced was *James Renchy*.

Who was examined by Mr. BURKE.

On the 21ſt of February the priſoner Renchy was in his houſe at Curbrack. The witneſs is his father. He Renchy lay the night before at Turlough, he came home about ſun riſe, and remained at home until the news came that three men were killed. One William Stoops told them that Jemmy was ſhot, and the priſoner ſaid "would he ſtay at home and Jemmy ſhot," and he did not quit Curbrack until after the account of the murder.

The ſecond witneſs in behalf of the Priſoner was *James Kelly*. Examined by *Mr. Owen*.

He is father to Wallace Kelly. He laſt lived on Mr. Fitzgerald's Eſtate, but now lives at Caſtlebar. He ſaw his ſon in his own houſe the morning Mr. Mc. Donnell was killed. His ſon and he were near the bridge at Turlough, between the bridge and Mr. Fitzgerald's houſe when the firſt and laſt of the guns were fired.

Here the Defence cloſed.

The *Chief Baron* then charged the Jury, and obſerved, that the caſes of the priſoners charged in the indictment ſtood on very different grounds. James Foy, John Cox, James Maſterſon, David Saltry, Philip Cox, John Berney, Humphrey George, Michael Bruen, or William Robinſon, did not appear to have been of the guard at the time the deceaſed were killed, nor to have conducted them on their way; and therefore it was but reaſonable to ſuppoſe that they declined to act in obedience to the directions given them to ſhoot their priſoners in caſe of a reſcue; and if the Jury were of that opinion they ought to acquit them. James Foy, was perhaps guilty of another offence, but not of that laid in the indictment. But as for John Fulton, he was proved by three witneſſes not only to have been of the guard at the time when they fired on their priſoners, but he was alſo proved by two witneſſes to have been one of thoſe who fired, and by one witneſs to have been privy to the ſecret that the reſcue was only a pretence; ſo that if the Jury believed the witneſſes they ought to find him guilty. David Simpſon was proved by three witneſſes to have been of the guard when they fired on their priſoners, and by two to have been one of thoſe who fired. Archibald Newing, and John Rehenny were proved by two witneſſes, and Wallace Kelly by one, to have been of the guard at the time of firing, but it did not appear that they, or any of them joined in the firing—However he conceived the law to be, that when a number of perſons enter into an unlawful deſign, and combine together to execute it, the ſhot, or ſtroke of one, is the ſhot or ſtroke of all. There was alſo another Legal Conſideration to be attended to,

and

and that was, that ſuppoſing the deceaſed to have been arreſted under Lawful proceſs, and an attempt made to reſcue, but without effect, and without any reſiſtance on their own part, or any attempt to eſcape and no neceſſity ſhewn for the killing, there could be no doubt, that in point of Law, that killing was murder.

It had appeared indeed that ſome of theſe men were ignorant whether there was a real attempt to reſcue; but the whole party had received directions in caſe a reſcue was attempted, to kill their priſoners at all events, and they purſued theſe directions in a manner which ſhewed a determined purpoſe to execute their horrid commiſſion, whether there was any neceſſity for it, or not.—They might perhaps be deluded with a belief that it was lawful to do ſo; but in his apprehenſion that was not ſufficient to juſtify or excuſe them in the eye of the law, of which every man is preſumed to be conuſant. It might weigh with his brother and himſelf to lay the ſituation of thoſe deluded inſtruments of another man's cruelty and artifice before Government, but would not juſtify the Jury in acquitting them.

As to two of them, Wallace Kelly and Rehenny, the two ſtories are ſo like, that they cannot be eaſily reconciled to belief. If, however, the Jury did believe the teſtimony of their witneſſes, in contradiction to that of the witneſſes for the Crown, they muſt acquit them. If not they muſt find them guilty.

Baron Power. The nature of the queſtion now for the conſideration of the Jury, made it neceſſary, he ſaid, to repeat what the law was, that an opinion may not circulate (and which he was ſorry to hear had circulated) that wherever an attempt was made to reſcue any perſons in cuſtody, thoſe who have the cuſtody of ſuch priſoners may kill them; adding, that by ſtating what the law was, men would alſo ſee what the law was not.

He obſerved firſt, in every charge of murder the fact of killing being once proved, every circumſtance tending to juſtify, alleviate, or excuſe, muſt be proved on the part of the priſoner, unleſs it ariſes from the evidence ſworn on the part of the crown, the law implying malice, unleſs the contrary appeared.

That Hipſon and M'Donnell were killed by the party ſent to conduct them, was a fact not denied. The queſtion then was, whether there appeared ſufficient matter to *juſtify, excuſe, or alleviate* that homicide.

Warrants againſt M'Donnell, Hipſon and Gallagher, for criminal offences, and an attempt made to reſcue the perſons in cuſtody, under thoſe warrants were the ground and foundation of the juſtification. (Here the Baron ſtated thoſe rules and principles of law mentioned by him on the trial of Mr. Fitzgerald,) adding, It would be extraordinary indeed, if what was contended for was the law of any civilized ſtate—that where a reſcue was attempted, even without the knowledge of thoſe in cuſtody, it was lawful to kill the priſoners. An apparent neceſſity for committing the homicide muſt in every caſe appear, otherwiſe an attempt to reſcue would be no juſtification; it was obvious,

obvious, he ſaid, that ſuch an attempt may be made uſe of as an artful, malicious device, to kill the priſoners.

Two queſtions were proper, he ſaid, for the conſideration of the Jury:

Firſt. Was there any attempt to reſcue?

Secondly. Have we here any evidence of ſuch an apparent, abſolute neceſſity, as he had ſtated, whether the priſoners could not have been conveyed before a magiſtrate, or to gaol, without committing the homicide? If they could then, notwithſtanding the attempt to reſcue, it will be murder: The queſtion of fact then was reduced to this conſideration, —Could twenty armed men carry three unarmed men to gaol, notwithſtanding one ſhot fired at the rear of the guard, or, notwithſtanding (what appeared the day before in evidence) that twelve men from behind a wall had fired twelve ſhots, without making any other attempt to reſcue the priſoners? Upon ſuch a queſtion, he ſaid, little difficulty could remain in the minds of the Jury; it was, however, a queſtion of fact proper for their conſideration, and to them he left it, with thoſe obſervations he had already made.

He then mentioned particularly the names of thoſe in the bill of indictment, againſt whom no evidence had been adduced, and thoſe againſt whom the evidence, if deſerving credit, was ſufficient, in point of law, to ſupport the bill of indictment; obſerving, that on the credit due to the ſeveral witneſſes, the guilt or innocence of thoſe ſworn againſt muſt depend—that as to thoſe who were proved to be preſent, aiding and aſſiſting the act of him who fired, was the act of all,

all, actually or virtually preſent, and upon the whole, if they did believe that thoſe who were ſworn againſt, did fire at M'Donnell and Hipſon, and that the others (whoſe names he repeated) were preſent aiding and aſſiſting, the Jury ſhould find them guilty, otherwiſe their verdict ſhould be Not Guilty.

The Jury withdrew, and in about twenty minutes brought in their verdict.

John Fulton, *guilty*
James Maſterſon, *not guilty*
John Cox, *not guilty*
David Saltry, *not guilty*
James Foy, *not guilty*
William Fulton, *guilty*
Philip Cox, *not guilty*
Archibold Newing, *guilty*
John Berney, *not guilty*
Humphrey George, *not guilty*
Michael Bruen, *not guilty*
John Rehenny, *guilty*
William Robinſon, *not guilty*
Wallace Kelly, *not guilty*
David Simpſon, *guilty*

While the Jury were out conſidering this verdict; the *Chief Baron* ſaid, as it got ſo near Sunday, that he thought it both proper and humane to paſs over that day, and, as the law in England, though not the law here, gave to murderers that day, in imitation of it to forbear pronouncing ſentence on Mr. Fitzgerald till Monday.

Mr.

Mr. *Attorney General* ſaid, in truth, he was well content that it ſhould be ſo. But he underſtood that there was a motion to be made in arreſt of judgment. If that motion were at all to be made, it muſt ariſe from defects upon the record, which could as well be ſhewn in five minutes as in five years; and the only advantage that he wiſhed to reap, was not to hear a long ſpeech; for the more time there were given, the longer the ſpeech, but not the better the argument; for a good legal mind could ſoon produce a good legal argument.

Mr. *Burke* ſaid, that he did not ſee any defect on the indictment; but Mr. *Stanley* had told him that he did; and he hoped the court would give the gentlemen on that ſide time to conſult together.

The *Chief Baron* requeſted that Mr. *Stanley*, who was out of Court, might be ſent for, and he having come in, then deſired him to acquaint the court if he had any motion to make in arreſt of judgment, in the caſe of Mr. Fitzgerald.

Mr. *Stanley* prayed time to conſider the queſtion; and

Mr. *Attorney General* aſked Mr. *Stanley*, as a motion in Arreſt of Judgment muſt ariſe from Error in the Record, whether he had not better have the indictment read, as poſſibly he never had heard it, or elſe had forgotten it.

The Indictment was then read.

Mr. *Attorney General* then deſired Mr. *Stanley* would ſtate what objections he had to the indictment.

Mr.

Mr. *Stanley* declared, he did not hold himſelf bound, in that ſtage of the buſineſs, to tell the Attorney whether he had any objection or not to the indictment, as he had already experienced that the Attorney General was neither diſpoſed to grant Mr. Fitzgerald any favour, or to act with that candor and humanity that would have done honour to his ſtation — a character that his predeceſſors in office had been ſo zealous to acquire, that he challenged him to ſhew a ſingle inſtance ſince the revolution, when an Attorney General had refuſed or withheld his *conſent*, to extend a liberal and a legal indulgence to a priſoner in a capital caſe, as had been done by the Attorney General at the commencement of the trial. But, he thanked God, it was not neceſſary for him to aſk the Attorney General's leave to make a motion in arreſt of Judgment. If, upon conſideration, the caſe would admit of it, happy it was for his unfortunate client, and happy it was for him, that he could have recourſe to Judges who had wiſdom enough to comprehend, and power enough to extend, thoſe advantages which the nicety and caution of the law provide in caſes of life, without the *conſent* of his Majeſty's Attorney General.

Mr. *Stanley* then told the Court, that he did not think it neceſſary for him at that time to ſtate whether he had or had not any objections to make in arreſt of Judgment; for he would undertake to ſhew that, if Mr. Fitzgerald was then ſtanding at the bar, and that the indictment was the moſt perfect one that ever was drawn by the hand of a lawyer, that the Court could not paſs ſentence on Mr. Fitzgerald, and he would ſtate his reaſons. It had been ſaid by Mr. Attorney General, that Mr. Fitzgerald waived the benefit of the law, and conſented to be tried before the principals; and that though in general

general either a derivative traitor, or an acceſſary in felony, ſhall not be tried till the principal is convicted, yet he may *conſent* to put himſelf upon his trial if he chuſes. He admitted Mr. Attorney General's Law, if the acceſſary expreſsly conſents to be tried firſt—but he denied the fact. Mr. Fitzgerald never conſented to be tried firſt; but if he did, the court would find it laid down, 1 Hal. 623. that though the acceſſary in felony, or the acceſſorial traitor in treaſon, does conſent to be tried before his principal, yet, ſays Lord Hale, if he be convicted, it is neceſſary to reſpite Judgment againſt him till the principal be convicted and attainted; for, if the principal be afterwards acquitted, the conviction of the acceſſary is void, and no judgment can be paſſed upon him; ſo, if the principal is outlawed, and thereupon the acceſſary is tried and convicted, if the principal afterwards reverſes the outlawry, and pleads over and is acquitted, the coviction of the acceſſary is reverſed. The derivative acceſſorial traitor is intitled to the very ſame advantages that the man acceſſary in felony is; and, upon this principle, it was moſt clear that no judgment could now be paſſed againſt Mr. Fitzgerald.

The *Chief Baron* then ſaid to Mr. *Stanley*, ſince that was his objection, he had better wait until the Jury had returned with their verdict.

Mr. *Baron Power* ſaid, he meant to give no opinion; but, being always of opinion that it was eaſier to obviate beforehand an objection than anſwer it afterwards, in order to have put an end to the queſtion, he had wiſhed to have had a juror withdrawn.

. . . . . .

The *Chief Baron* ſaid, he had wiſhed ſo for the ſame reaſon.

The Jury then returned with their verdict againſt the principals; and Mr. *Stanley* begged time till Monday to conſider whether any motion could be made in Arreſt of Judgment.

The *Court* ſaid, God forbid, that they ſhould feel any inconvenience, or refuſe to grant him any reaſonable time he might deſire; but they begged him to conſider well of his motion, and to remember that it muſt be made in the preſence of Mr. Fitzgerald. If, however, he perſiſted in it, it was their duty to attend to, and they muſt and would hear his motion.

Adjourned to Monday.

MONDAY, JUNE 12.

THE Court met purſuant to adjournment. Timothy Brecknock was brought to the bar, and tried upon the ſame indictment upon which Mr. Fitzgerald had been convicted. Mr. Brecknock applied to the Court, and begged leave before his trial to pray to his Heavenly Judge for about two minutes. He accordingly fell upon his knees, and remained in ſilence for ſome time. When he was deſired by the Clerk of the Crown to look to his challenges, he aſked, "How it was poſſible for him, an alien born, "to make exceptions to perſons, according to conſanguinity, up to the 5th degree; but he would "make a general challenge of all the inhabitants of "Caſtlebar, all of the name of M'Donnell, and, he "believed, all of the name of Higgins."

The

The following gentlemen were ſworn on the Petit Jury, viz.

James Browne of Browne-Hall, Eſq.
Thomas Samuel Lindſey of Milford, Eſq.
John Knox of Ballina, Eſq.
Peter Lynch of Caſtlecarra, Eſq.
Thomas Lindſey, Jun. of Hollimount, Eſq.
George Jackſon of Proſpect, Eſq.
Smyth Steel of Foxford, Eſq.
James Gildea of Croſslough, Eſq.
John Ormſby of Ballinamore, Eſq.
Thomas Ellwood of Caſtletown, Eſq.
John Nolan of Loughboy, Eſq. and
Patrick French of Ballykinneave, Eſq.

Mr. *Brecknock* then addreſſed the Court; and ſaid, he believed, it was in his Lordſhip's recollection that he had formerly claimed a *Medietas Linguae* Jury; that he did not mean to mention or name the ſtatutes of Edward, nor that of Henry the 6th, but he meant that older law of Athelſtan, called, *Pax inter populum & Regem.*

The Lord *Chief Baron*. "Mr. Brecknock, this is waſting time. It was formerly aſſerted by you, that Scotſmen, before the union, had a right to a trial *per Medietatem Linguae*—the fact was not ſo; and ſince the union the practice uniformly has been otherwiſe: the people of Ireland and England ſpeak one tongue, have one common language, and are governed by one common Sovereign; and let it not go abroad, that Engliſhmen are conſidered as aliens in this kingdom. Engliſhmen inherit in Ireland, and, *vice verſa*, Iriſhmen in England. Both countries have the ſame laws, the ſame conſtitution, and the ſame happy government."

The Court having thus over-ruled this point, Mr. Brecknock claimed as his right the inſpection of the bill of indictment, that he might know whether it was found by twelve jurors or not; for if there were not twelve jurors to the finding, the whole was over.

The *Chief Baron* then informed him, that the bill bore the name of the foreman, ſigned for himſelf and fellow-jurors, and that was ſufficient.—

Mr. *Brecknock* ſaid, Hawkins ſays not.

Mr. *Attorney General* then ſtated the evidence, and called Andrew Gallagher, who was the firſt witneſs in ſupport of the proſecution. He was taken on the 20th of February, and carried priſoner to Turlough, where he was detained that night, he could diſtinguiſh Mr. Brecknock's voice. In the morning he obſerved a guard with arms. He ſaw Mr. Brecknock and Mr. Fitzgerald at the door in Turlough-Houſe; they firſt ſpoke together in French, or in ſome language which the witneſs did not underſtand. Mr. Fitzgerald called over Foy and Andrew Craig, in Brecknock's preſence, and ordered them to move the guard higher up, and to tell them in caſe of a reſcue to ſhoot their priſoners. He heard Mr. Fitzgerald ſay, when Scotch Andrew went to the guard, "Ha! we ſhall ſoon get rid of them now." "Oh! ſays Mr. Brecknock," that's well, we ſhall then be eaſy indeed." M'Donnell and Hipſon are dead. Hipſon was ſhot by part of the guard from the Houſe at Turlough, he was ſhot from the rear. The witneſs himſelf was wounded; he was brought back to Turlough, Mr. Brecknock told him, the witneſs, in Mr. Fitzgerald's houſe, that he would be puniſhed for ſo heinous a circumſtance as a reſcue.

Mr.

Mr. *Brecknock* ſaid, from what had fallen from Mr. Gallagher, his teſtimony ought not to be received; for it did appear in two manners, that he had fled from juſtice—*Ore tenus*; and the court had a record of his conviction upon that flight.

The *Chief Baron* begged of Mr. Brecknock to deſert ſuch idle babble, and to commit himſelf to his council.

He was then croſs-examined by Mr. Owen.

He cannot ſpeak French; but from hearing it ſpoken by others, he believed the language in which Mr. Fitzgerald and Mr. Brecknock ſpoke to be French. He ſaw no aſſent given by Mr. Brecknock to Mr. Fitzgerald's propoſals; but he heard Mr. Fitzgerald ſay," Ha! we ſhall ſoon get rid of them now;" and Mr. Brecknock reply," O! that is well, we ſhall then be eaſy indeed; and the words, we'll be eaſy indeed were not coupled, with other words. Mr. Fitzgerald does ſpeak in a low voice, but the witneſs has heard him ſpeak as loud as any man. As to Mr. Brecknock, the Court had heard him juſt then, and could tell whether he ſpoke loud or not. Mr. Fitzgerald and Mr. Brecknock were in the room together when the witneſs was brought back to the houſe of Turlough. Mr. Fitzgerald wrote ſeveral notes, and received ſeveral notes, and he ſhewed them all to Mr. Brecknock. They ſpoke together in a foreign language.

Mr. *Brecknock* ſuggeſted, that the ſtatute of the 10th of Henry the 7th was a mere temporary act; and would their lordſhips, after an interval of near two hundred and ninety one years, wreſt it to the preſent purpoſe?

The

The ſecond witneſs for the Crown. Andrew Craig *examined by* Mr. Patterſon.

Remembered the morning M'Donnell and Hipſon were ſhot, he ſaw Mr. Brecknock bringing a book into the ſmall room to Mr. Fitzgerald; he laid it on a table or chair, and pointed with his finger, and ſaid " there is the place you want." There was no paſſage read in Brecknock's preſence. Mr. Fitzgerald called the Book an act of parliament, and read, or ſeemed to read, that it was lawful to ſhoot a perſon charged with felony, if he attempted a reſcue. He ſaw Mr. Brecknock about the houſe, and at the door that morning, and talking with Mr. Fitzgerald. but he does not know about what they were talking. Mr. Fitzgerald's orders to the witneſs were to make a man go on, and fire the reſcue ſhot. The Priſoners were ſhot in conſequence of that ſhot.

In an anſwer to a queſtion from the Court,

He ſaid, he did not recollect being preſent at any converſation between Mr. Brecknock and Mr. Fitzgerald before on that morning.

He was croſs examined by Mr. Burke.

The witneſs lived for two years and half with Mr. Fitzgerald; Mr. Brecknock had been with him this year and half; Mr. Fitzgerald and Brecknock were fond of reading law books together. The witneſs could not tell whether it was to that point or another that the book was applied. They had lived at Turlough for nine months.

To another queſtion from the Court,

He ſaid, it was ſome time before the laſt general aſſizes, that the firſt attempts were made on Mr. M'Donnell.

To a queſtion from one of the Jury,

He anſwered, Mr. Brecknock laid the book on a table or chair.

The Third Witneſs for the Crown. Patrick Dornin *examined by* Mr. O'Hara.

He was one of the guard appointed on the 21ſt of February; they were drawn up before the houſe at Turlough; he received directions from Mr. Fitzgerald—he told them how to behave. The directions were if they ſhould meet with any oppoſition or reſcue, to make ſure of the priſoners. There were two or three queſtions among the people as to what was ſaid by Mr. Fitzgerald; ſome ſaid it was "kill them" but the words he heard were "make ſure of them." Brecknock and Mr. Fitzgerald were together at the doors, when theſe directions were given. Mr. Hipſon was killed dead. He ſaw no perſon upon the road but the guard, nor no attempt of a reſcue. John Fulton was of the Guard, as were William Fulton and Renchy.

He was croſs examined by Mr. Stanley.

Between ſix and ſeven o'clock the orders were given; all the guards were preſent. The orders were given firſt to Andrew Craig at the head of the guard, and then to the guard. Mr. Fitzgerald gave the

the orders firſt at the door, and Andrew Craig told the orders on the road. All the guards were on the centre of the road. Mr. Fitzgerald came off the flag; he did not come cloſe to the guard, he came two or three paces; the witneſs was in the centre of the ranks.

The Fourth witneſs for the Crown. Sir Neil O'Donnell *examined by* Mr. Daly.

He took the examinations of Dornin. Dornin was in the crowd where Mr. M'Donnell lay dead. Dornin told the Witneſs he wanted to ſpeak to him about that buſineſs, that he was one of the unfortunate guard, and all the juſtice he could do was to tell all he knew. He had got ſome ſmall ſhot in his back.

The fifth witneſs for the Crown. James Calpin *examined by* Mr. Attorney General.

He was on the road the morning M'Donnell was ſhot; he after that ſaw the priſoner Brecknock; he heard Brecknock aſk a man very like a miniſter, (who was wringing his hands) inſide of him, "Why he moaned?" the gentleman paſſed in, and Brecknock ſaid to the guard "Lads, your maſter is angry for your leaving this man alive, for he will certainly do you a great deal of harm," Gallagher was at that time about a muſquet ſhot from the houſe, or better, with the guard coming down the hill.

He was croſs examined by Mr. Burke.

He never told any body what he had now given in evidence, until he was ſummoned by my Lord the Judge. On the evening of the murder, there was a man,

man, with his wife and children who wanted to go to Caſtlebar, and the witneſs told him if he would ſtay with him that night he would give him potatoes for his ſupper, and ſtraw for his bed:—In return for which the man ſaid, if in his power he would ſerve him for ever. That man was now in the ſervice of Mr. Gregory, and he ſuppoſed that Mr. Gregory had the ſummons ſent to him.

In a queſtion from one of the Jurors.

He ſaid, it was not common for the people to ſtand and hear any thing at Mr. Fitzgerald's doors, but he apprehended that Mr. Gallagher might be hurted, and he ſtayed to ſee how he, Mr. Gallagher, might be uſed.

To a queſtion from another of the Jury.

He ſaid, that only a third of the guard had come to Turlough when this had happened.

[Here the proſecution cloſed.]

In the defence of the priſoners the Rev. Henry Henry *was firſt called.*

He was examined by Mr. Owen.

He ſlept at Turlough-houſe the 20th of February. He ſaw the guard on the 21ſt of February laſt. He, as far as he recollected, did not ſee Mr. Brecknock before the guard went off. He did not on the former trial ſwear that Brecknock was in his bed, but that the witneſs did not ſee him, and believes him to have been in his room. He could not perfectly recollect whether he ſaw Mr. Brecknock after the return of Gallagher, he was ſo confuſed, from ſeeing men in the pangs of death. He did not recollect

whether Mr. Brecknock was among the people who were about the houſe with him. He did not perfectly recollect ſeeing Mr. Brecknock after the return of Gallagher.

To a queſtion from the Chief Baron.

He ſaid, he did recollect wringing his hands; and being aſked by him, Whether he recollected to ſee that man who had been juſt examined at that time? he anſwered that he did not, from his confuſion, recollect. He might have wrung his hands; but that he remembered a man with red hair called to him to tell him, that he was ſummoned by a crown ſummons, and requeſted to know whether he might with ſafety not attend? He knew Mr. Brecknock only for about twelve days. He believed him to be the laſt man in the world who would have a thirſt for blood, and he would give particular inſtances.

Mr. *Attorney General* objected to ſuch kind of evidence as being inadmiſſible. He relied, on it that in giving evidence of character, general evidence only was to be received, and that particular inſtances could not be adduced.

Mr. *Stanley* contended that it might be admitted. The clear rule of evidence, he ſaid, was this: when a witneſs is called to impeach a man's character, he can only do it by general accounts of his conduct and behaviour, and he ſhall not be permitted to give evidence of particular facts, which the perſon is not then prepared to combat with evidence; for no man is bound to defend every action of his life when unprepared for that purpoſe. But this rule does not hold when you call a witneſs to

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ſupport a man's character, the witneſs may not only give him a good character, but he may give his reaſons for entertaining that good opinion of him; and he remembered the point ruled at the ſpecial commiſſion in St. Margaret's-Hill in the Borough of Southwark, on the trial of the rioters in 1780, A man was indicted on the riot act 10 George 1ſt. a witneſs was called to give him a character, he gave him a good one, and ſaid his reaſon for entertaining that good opinion of him was, that he knew him to be a dutiful ſon, and that he ſupported a helpleſs parent by his induſtry. An objection was then made to this kind of evidence, and Lord Loughborough and Mr. Juſtice Good, made the preſent diſtinction, and ruled it to be proper evidence.

Mr. *Attorney General* ſaid, that when Mr. Stanley's Reports had the *fiat* of the judges, they might then be cited; but he preſumed that their lordſhips would follow the known rules of evidence.

Mr. *Baron Power* ſaid, that in giving general character, the witneſs might give evidence of the reaſons why he gave that character.

Mr. *Henry* then proceeded in his evidence: he knew that Andrew Craig had a particular averſion to to the priſoner. He had heard him ſay, that he would not call a gentleman a liar; but the priſoner went as near to telling lies as any man could do; that Craig hindered the ſervants from taking turf to Mr. Brecknock's room, and from doing any thing for him; and he often heard Craig ſay, "damn him." He did not think the priſoner a man of a ſanguinary diſpoſition, for he remembered a particular inſtance of Andrew Craig nicking a horſe which belonged to him the witneſs, upon which the priſoner

reproved him, and told him he would certainly bring down vengeance for the ſhedding of blood.

Second witneſs in the defence. Judith Kilgallen *examined by* Mr. Stanley.

She knew Mr. Brecknock ever ſince he came to Turlough. On being aſked what time he aroſe, the priſoner interrupted and replied, "that he always roſe fifteen minutes before ſun riſe, to waft his prayers to heaven." On the queſtion being put again to the witneſs, ſhe ſaid ſhe could not be particular; he got up ſometimes early and ſometimes late. She did not on that day ſee him until after eight o'clock. She ſaw the guard go off, and on the return of the guard ſhe ſaw Mr. Brecknock about the houſe.

She was croſs examined by Mr. O'Hara.

She was not much fatigued with ſitting up all night.

Third Witneſs in the defence. John Scott *examined by* Mr. Burke.

He was up all night. He did not ſee Mr. Brecknock until the guard came back. He ſaw the guard go off, and if Mr. Brecknock was then there he muſt have ſeen him.

He was croſs examined by Mr. Attorney General,

Who aſked him, if he was the witneſs who had ſworn on the other night that Mr. O'Meally had ſigned the warrants in the kitchen,—and that had ſworn that Paddy wrote the examinations there,—and that Fulton wrote his own name? to which Scott having

having anſwered that he was, Mr. *Attorney General* then ſaid he would not aſk him a ſingle queſtion.

Fourth Witneſs. The Reverend John Benton *examined by* Mr. Burke.

He had known Mr. Brecknock for ſome years; he believed from 1782, when Mr. Fitzgerald was confined in the new priſon—he cannot tell his general character; but he did not think him capable of perpetrating any ſanguinary act, becauſe he had heard him frequently reprove men for the ſlighteſt immoralities.

He was croſs examined by Mr. Attorney General.

He knew Mr. Fitzgerald very well, and always had taken him to be a man of abilities. He knew that he, Mr. Fitzgerald, conſulted Mr. Brecknock as a Man of law. He believed he, the witneſs himſelf, might have been conſulted by Mr. Fitzgerald. He did not believe that if Mr. Fitzgerald had ſuch a ſanguinary mind, the priſoner was capable of counſelling and adviſing ſuch facts. He believed that he had ſaid that the priſoner was the cauſe of all the miſchief which had befallen to Mr. Fitzgerald; but his reaſon for ſaying ſo was, that he knew Mr. Fitzgerald had been led aſtray in his property, as to the writ of error, in which the gentleman then examining the witneſs as a lawyer (Mr. Attorney General) had been concerned; and he believed if he, Mr. Fitzgerald, had not been ſo miſguided, Mr. Fitzgerald would not have had any occaſion to have come to that country,—and he alſo knew that Mr. Fitzgerald had not one law book before he knew Mr. Brecknock.

[Here the priſoner cloſed his defence.]

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The *Chief Baron* then charged the Jury, and ſtated that the priſoner Timothy Brecknock, was charged in two indictments with procuring a murder to be committed, and the law had made that crime equal in guilt, with the perpetration of murder itſelf, and with great juſtice; for the artful wretch, who contrives a murder; is more criminal than the unfortunate inſtrument of his malevolence. To bring this crime home to the priſoner: a murder muſt have been committed; and by his procurement. That a murder had been committed, was clearly proved by the witneſſes and had been eſtabliſhed by ſix verdicts. To effectuate that murder, a plan; and a very artful plan had been laid. If Andrew Craig be believed, the plan moved from Brecknock, who is ſworn to have produced a book, in which it was laid down for law, that it was lawful to kill priſoners charged with felony, in caſe of a reſcue. But credit was not lightly to be given to the teſtimony of a perſon of Andrew Craig's deſcription, eſpecially when it appeared by the evidence of Mr. Henry; That Craig was ill inclined towards the priſoner; Dornin, another witneſs, ſeemed alſo to differ from him. That Andrew Gallagher had proved that the priſoner was preſent, when Mr. Fitzgerald had given directions to the guard to ſhoot their priſoners, and gave his countenance to theſe directions. That when Mr. Fitzgerald expreſſed his opinion, that they ſhould now get rid of theſe fellows, the priſoner replied, it is well; we ſhall then be eaſy indeed. James Calpin alſo had given material evidence to ſhew, that the priſoner was conſenting to the plan. Witneſs were examined to the character of the priſoner. The reaſon why character is allowed as evidence in

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capital caſes is, that the law in favour of life, preſumes innocence till guilt has been proved, and where the matter reſts in doubt; evidence of good character fortifies that preſumption, but theſe doubts are not to be light or frivolous doubts, but ſuch as would ariſe in a ſteady mind, from a cool and diſpaſſionate conſideration of the caſe. If therefore upon the whole of the caſe, the jury believed that a plot was laid againſt the lives of the deceaſed, and that he was concerned in laying that plot, they ought to find him guilty: but if they thought there was no plot laid, or if there was, that he was neither privy nor conſenting to it; they ought to acquit him; or, if they thought themſelves warranted to entertain doubts about his guilt, it was their duty to incline to the ſide of mercy.

Mr. *Baron Power* obſerved that, this was the ſame indictment upon which Mr. Fitzgerald had been convicted; but the Jury ſhould feel no prejudice on that account againſt the priſoner at the bar. They were not to infer that the priſoner was guilty, becauſe Mr. Fitzgerald was proved to be ſo; the priſoner, ſaid he, may be innocent notwithſtanding the guilt of Mr. Fitzgerald. The bills of indictment were founded on the 10th Hen. VII. charging that the priſoner did provoke, ſtir up, and procure certain perſons to murder Mr. M'Donnell and Hipſon; to ſupport this charge, it muſt appear that the murder was committed; and, notwithſtanding the conviction of Fulton and others on the preceding day, the priſoner at the bar might have given evidence tending to juſtify, excuſe, or alleviate the homicide; but that defence, which had been relied on in the caſe of Mr. Fitzgerald, he obſerved, had been wiſely abandoned in the preſent caſe. That there exiſted

exiſted any neceſſity for committing the homicide, that the law might have been executed, and the perſons in cuſtody conveyed before a magiſtrate or to gaol without firing one ſingle ſhot, were facts not in this caſe controverted on the part of the priſoner — he had reſted his defence on ſtronger ground. His defence is, that he did not provoke, ſtir up, or procure any of the perſons named in the indictment to commit the murder—he obſerved that four witneſſes had given teſtimony that he did; but the Jury only were the conſtitutional judges of the fact, and the credit due to thoſe who atteſted it; that the priſoner had given evidence of general good character—with regard to this ſpecies of evidence, he would give them ſome legal information. If the fact alledged in the indictment be fully and clearly proved, character becomes totally uſeleſs. If a man be happy enough to have the good opinion of all his neighbours—to be thought in the opinion of all thoſe preſent incapable of committing the horrid crime he was charged with—if, notwithſtanding, it ſhould be fully and clearly proved that he did kill another without any, or without a ſufficient provocation, the unhappy perpetrator, however good his character before was, muſt anſwer for the crime; and character will not avail one grain in the ſcale of Juſtice: but if, on the contrary, the charge be not fully and clearly proved—if it be doubtful whether he was guilty or not—then, indeed, character ſhould turn the ſcale, and the jury ſhould lean to the merciful ſide. He concluded, that it ſhould ever be remembered by Jurors (to uſe the higheſt and beſt authority) "that it "is better ninety and nine guilty perſons ſhould "eſcape, than that one innocent man ſhould ſuf-"fer."

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The Jury retired for about ten minutes, and returned with their verdict——GUILTY.

The foreman of the Jury then recommended him to mercy; and having preſſed it ſtrongly, the Court aſked the Jury if they had any doubts of the guilt of the priſoner, or any wiſh to reconſider their verdict?—to which the foreman replied not.

ANDREW GALLAGHER was then brought up to be tried, for the ſame charge which John Gallagher and the other Gentlemen were acquitted of on Thurſday laſt: And the following Gentlemen were ſworn of his jury:

James O'Donnel, Eſquire.
Patrick Kirwan, Eſq.
George O'Malley, Eſq.
William Orme, Eſq.
Patrick Taaffe, Eſq.
John Joyce, Eſq.
Edmund Taaffe, Eſq.
Bartholomew French, Eſq.
Walter Burke, Eſq.
Arthur Lindſay, Eſq.
George Bingham, Eſq.
Thomas Ormſby, Eſq.

THE Attorney-General having declared that there was no evidence,

The Jury inſtantly returned a Verdict, NOT GUILTY.

The Court then ordered up the ſeveral Perſons who had been found Guilty on Saturday laſt, to

receive ſentence. And accordingly John Fulton, William Fulton, Archibald Ewing, John Rehanny or Renchy, and David Simpſon, were put to the bar; and on being asked what they had to ſay, why Judgment of Death, and Execution thereon, ſhould not be awarded againſt them.—John Fulton ſaid, He was very young, and had been deluded;—he was a ſtranger, and dared not to diſobey; and requeſted the Court to give him time for repentance.

The Chief Baron then ſaid, That mercy was not in their diſpoſal;—that his duty was a painful one, it was to pronounce the ſentence of the law upon them:—which having done; he adviſed John Fulton to prepare himſelf for immediate execution.—They were then remanded; and the Gaoler was directed to bring up Mr. Fitzgerald and Mr. Brecknock.——While the Gaoler was abſent, the Chief Baron asked Mr. Stanley if he meant to make his motion in arreſt of judgment;—and Mr. Stanley having ſaid he did, the Chief Baron replied: In regard to the feelings of the unhappy Gentleman, I avoided having him brought into court, which he ought to have been, while ſentence was pronounced on the other unhappy ſufferers. It is for your conſideration, whether you think you are ſufficiently founded in your claim for an arreſt of judgment, to expoſe the Priſoner to that ſituation which I have avoided, becauſe I knew it would be painful to his feelings. If you continue in your intention, he muſt be brought up to be preſent at your motion. You will alſo conſider, what you may obtain; for I muſt inform you, that, ſhould you ſucceed in your motion, we muſt ſend up a new bill of indictment, free from thoſe objections, and which will

will doubtleſs be found by the Grand Jury;—and we muſt ſtay and try the Priſoner, and muſt deliver the gaol, if we remain till the middle of term.—See alſo if there can be any doubt of the ſame Evidence convicting him again; and will you expoſe him again to that ſituation?

Mr. Stanley ſaid, He was ſure Mr. Fitzgerald was ſafe in the hands of the learned Judges;—and that, if any advantage could be derived from the nicety or caution of the Law, it would be as much the inclination as it was the duty of the Learned Judges, to give the Priſoner the full benefit of thoſe advantages.

While the Gaoler was abſent,

Baron Power ſaid, That one objection, and one only, had been made, and it was made by Mr. Stanley;—but he, the Baron, differed from him, as to that objection. If, however, it had been made ſufficiently early, he would have called on his Majeſty's Attorney-General to bring on the trials of the Principals firſt. He would, however, now ſpeak to the point.—If, in the ſtage that had been propoſed, a Juror had been diſcharged, what would have been the conſequence?—He knew My Lord Chief Juſtice Holt had laid it down, That a Jury, once charged, could not be diſcharged: However, there is a more modern authority, in Kinloch's caſe. But there it was done by the Attorney-General's conſent.

It was urged, that he Mr. Fitzgerald was a derivative traitor; and that a derivative traitor partook ſo much of the nature of an acceſſory, that he

he could not be tried until after the Acceſſory had been found guilty: but if it were ſo, he had waived that benefit, by challenging the Jury. But he ſhould endeavour to ſhew, by the very authority of Foſter, that the indictment was for a ſubſtantive, and not a derivative treaſon; that it was the ſame as if on the 25th of Edward III.

He was indicted for *procuring, ſtirring up, and provoking to ſlee and murder*, and this is declaree by the ſtatute to be treaſon, like as againſt the King's perſon.

He never would try a derivative Treaſon or acceſſorial offence, until the principal ſhould be convicted. But he ſaid that act of parliament made it the ſame as the 25th of Edward III. and referred to Foſter, page 342.

Here Mr. Fitzgerald and Mr. Brecknock being brought up, Mr. Baron Power forebore concluding his argument; and Timothy Brecknock being aſked what he had to ſay why judgment of death and execution thereon ſhould not be awarded againſt him.

Mr. *Brecknock* ſaid he had three objections to ſtate, which he wiſhed to be heard to, and on which he truſted that their Lordſhips might arreſt the judgment.

Firſt. The ſtatute and the ſentence conveyed therein were contrary to the law of Almighty God; for when David had procured the murder of Uriah, the ſentence was, that the ſword ſhould not part from his houſe, but that he ſhould not die.

Secondly,

Secondly. That he had not ſeen the bill of indictment, to know, whether there were twelve jurors upon it, or to know, whether one of theſe jurors may not be a minor, or an alien, perhaps in the ſervice of a foreign King, at war with his Majeſty, as had been the caſe of the gentleman at his ſide, Mr. Fitzgerald.

Thirdly. Being an alien, he had not been allowed the benefit of a *Mediates Linguæ*.

The Court over-ruled the objections and ordered the Clerk of the Crown to proceed, who bid the Jailor make a bar.

Put Timothy Brecknock to the Bar.

And the Chief Baron then ſaid,

PRISONER at the BAR!

If it is poſſible there can be any degree of Guilt beyond the Crime of which Mr. Fitzgerald is convicted, it remaineth with you, Timothy Brecknock; for under the colour of the Law, you deviſed an artful and a wicked Scheme to commit a horrid and a barbarous Murder. The Laws of the Land demand your Life as a juſt Forfeit for the Blood which has been ſhed; and thoſe deluded Wretches whom you inveigled into your plot, and whom you deceived under hopes of ſafety, to become the Inſtruments of your horrid Deſigns, are Objects of Pity, when compared to the magnitude of your Guilt. You made their Ignorance the means of your Purpoſes. Unfortunate old Man! happy had it been for you that you never had known Law at all, or that you had known it better. The unhappy Gentleman who is now at your ſide,

ſide, would not have been brought to the wretched ſituation in which he now ſtands, or to the dreadful End which muſt now await him. Miſerable Man! you are fallen a Victim to your own Subtleties, and become the Dupe of your own Cunning. The venerable Appearance you have aſſumed, and the Sanctity which you affect, I fear is but put on as a Diſguiſe for the concealment of your Wickedneſs. The Law which you endeavoured to pervert. has furniſhed the detection of your Crime, and will ſhortly award the Puniſhment which attends your Conviction. Your Jury from a miſtaken lenity have recommended you to Mercy, not that they doubted of your Guilt, but that they pitied your Age and your Infirmities. Your Crime is by many degrees of the deepeſt and blackeſt die, and it only remains for me to pronounce the dreadful Sentence.

He then paſſed Sentence upon him.

The *Chief Baron* then deſired the Clerk of the Crown to proceed; who bid the Jailer put George Robert Fitzgerald to the bar; and the Chief Baron proceeded by ſaying: You ſtand convicted of provoking and procuring a horrid, foul, and barbarous murder. It is my duty, and a painful taſk indeed, I feel it, to pronounce that ſentence which the law has annexed to your crime. After a long and ſolemn tryal in which you had every benefit of able Council, and experienced every indulgence the Court could ſhew; you were convicted on the cleareſt evidence, by a jury of your Countrymen; in two inſtances of procuring the murder of two of his Majeſty's ſubjects. An offence which our laws ſo juſtly hold in abhorrence, that they have placed it in an

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equal degree of guilt with high treaſon againſt his Majeſty's perſon. In your caſe which is an uncommon one indeed ! it is attended with a degree of cunning and contrivance which exceedingly agravate its enormity,—but that very cunning, which you vainly hoped would have ſcreen'd you from puniſhment, has rather led to the detection of your guilt; the laws of your country which could not endure that they ſhould be made the inſtruments of their own violation,and the blood of the unhappy gentlemen, who had the misfortune to fall into your hands, and whom you ſent into the other world with all their Sins, upon their heads; call aloud for puniſhment, and require your life as a forfeit to public juſtice. Even providence has interpoſed that juſtice might not be diſappointed, and in the midſt of murder preſerved the life of one man, as a witneſs for the diſcovery of your crime. The hand of GOD protected your life from aſſaſſination, that it might be offered up as a ſacrifice on the altar of public juſtice. In the melancholy ſituation to which you have reduced yourſelf, it might be ſome degree of conſolation to your feelings, that your ignominy and puniſhment were confined to your own perſon, but your miſerable family, tho' innocent of your crime, are, in ſome meaſure, involved in your diſgrace, and ſhare unjuſtly, that ſhame which your ignominious end brings down upon them. The aged parent who bore you in her womb, your tender daughter, the offspring of your loins, your wife the inconſolable partner of your bed; partake of your diſgrace. You came into the world with the advantages of talents, which if properly cultivated, would have carried you thro' life with reſpectability and honor. See how you have miſapplied them. Bleſt

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with the recommendation of birth and fortune allied to great and reſpectable connections; poſſeſſed of every qualification requiſite to render you an ornament to ſociety, and a valuable member of the community, You are now ſunk to the loweſt extremity of human infamy and ſhame. With a mind ſuſceptible of honorable feelings, you are become an outcaſt; a victim to the laws of the land, which you live in. It is my duty to pronounce to you the dreadful ſentence of the law, but before I do ſo, let me expreſs my earneſt hope that during the time which the mercy of the court has allowed you, you have by a ſincere repentance and a heart thoroughly ſubdued to a ſenſe of your guilt, recommended yourſelf to that mercy and forgiveneſs, which you can only expect from the awful tribunal before which you muſt ſhortly appear.

Here his Lordſhip was interrupted by Mr. FITZGERALD, who proceeded as follows:

I beg leave to trouble your Lordſhips with a few words. I ſhall be very ſhort. I do not mean to caſt blame any where. I accuſe no one. From the evidence, the Judges could have given no other charge. The Jury could have found no other verdict. I think the verdict of the Jury a juſt one, according to the evidence, which was produced; but I did not think ſuch evidence could have been produced. I did not think ſuch charges could have been made againſt me, or I ſhould have been better prepared. I had no idea of been found guilty. There are ſome family affairs which I have been endeavouring to ſettle, and which in truth are not yet finiſhed, that I could have wiſh'd to have compleated. All, that

that I requeſt of your Lordſhip, is to give me the longeſt day poſſible, that I may be prepared to meet my GOD. However guilty, I may be conceived, within a narow circle, I hope in a higher one, the unprejudiced part of the world will think me innocent: Thoſe, who know me from my earlieſt life, know me incapable of ſuch an action. I never feared death; nor am I afraid to meet it in any ſhape; in the moſt formidable, even an ignominious death. It may be thought I wiſh to ſolicit pardon, I would not accept of pardon after being found guilty by ſuch a Jury, becauſe I know I could not face the world after it. It has been ſuggeſted, and I underſtand the report prevails, that I wiſh for time in order to commit ſuicide. As a worldly man I never feared to meet death; and as a Chriſtian, which I hope I am, and a good one, what ſort of a paſſport would that be to the place of Eternity?—I forgive every one, and though I aſſert my innocence, I do not mean to ſay I have no ſins, I have many which overwhelm me, and I only requeſt time that I may make my peace with GOD.

Having finiſhed, the Chief Baron proceeded as follows:

It is not in our power to grant your requeſt. We are not the diſpenſers of mercy. Your offence is of ſuch a nature, that my brother Judge, and myſelf, thought ourſelves juſtified to have ordered immediate execution, nevertheleſs, from the hope that you might be better prepared to meet your approaching fate with becoming penitence; you have been allowed two days.—If by time, you mean a few hours, I am ſure the Sheriff will ſhew you every humanity. It is my duty, and I call GOD and Heaven to witneſs, that it

is the moſt painful one I ever performed, to pronounce the dreadful ſentence of the Law.

Here the Chief Baron pronounced ſentence of death upon him, on the ſame day.

At half paſt four in the evening Timothy Brecknock and John Fulton were brought out in a cart. There being no gallows, a temporary ſcaffolding which ſurrounded the walls of the new gaol, was fixed upon as the ſpot of execution. Brecknock bowed to the ſpectators on each ſide, as he approached the ſcaffold. He was dreſſed in a plain drab coat, his hair curled in his neck, and a long grey beard which reached down his boſom. He appeared perfectly ſerenea nd reſigned, apparently as uninfluenced by the approach of death, as if he was a common ſpectator of a tranſaction to which he was indifferent. Fulton who was beſide him, exhibited every ſympton of horror and fear. —his eyes remained ſhut—his countenance was that of a dead man, and his voice was ſo low as to be hardly audible to thoſe near him. He confeſſed his guilt of the crime for which he was about to ſuffer, and ſaid that Mr. Fitzgerald did not give orders himſelf, but ſent them by Scotch Andrew. He ſtated alſo, that when Mc Mullen and himſelf ſhot at Mr. Mc'Donnell, and wounded him in the leg, Mr. Fitzgerald ſaid, the Devil fire your eyes for a blind ſcoundrel, why did not you aim higher. He could not tell whether Foy was in the ſecret of this plot, but there were others to which he was privy. There were many divines who attended the unhappy ſufferers, and prayed round the cart. Fulton prayed with the utmoſt

utmoſt devoutneſs, and when the prayers became ſo loud and fervent that the ſpectators joined, the clergyman requeſted Brecknock to join alſo. He replied it was unneceſſary, for he had made his peace with God, and had not to his own knowledge committed a ſin for theſe laſt fifteen years. He exhorted Fulton to confeſs all he knew, and conceal no particle of his crimes. On their kneeling a ſecond time, and the clergyman repeating the Lord's prayer to Fulton, Brecknock repeated it alſo in Greek. He ſtood up in the cart, adjuſting his cloaths, and having taken a woollen night cap out of his pocket, he ſaid it was the laſt time he ſhould have occaſion to put it on; but that he had no apprehenſion of what he was about to ſuffer. He bowed to the crowd, and having drawn down the night-cap, he put one hand in his breeches pocket, and the other in his boſom, and ſtood for ſome little time in that poſture, but Fulton begging for a few more moments to pray, he pulled off his cap, and told him he ought not to delay, for he had full time to prepare for repentance. Having been given five minutes longer in which time Fulton ſeemed ſo faint as to hardly have the appearance of life, Brecknock replaced himſelf in the ſame poſture, and the cart drawing off they were launched into eternity. Fulton expreſſed no ſymptom of agonies, but the unfortunate Brecknock continued for a long time alive, until the compaſſion of the people, cried out to the hangman, who pulled him by the ſhoulders, and relieved the wretched old man from the pangs of torture.

At ſix o'clock Mr. Fitzgerald was brought out of gaol. He obtained permiſſion of the Sheriffs to walk, and came through a by-lane, and

up the public ſtreet, to the place of execution. He was preceded by the hangman, who wore a large maſk. He walked very faſt, and arriving at the ſcaffolding, aſk'd if that was the place. He was dreſſed in a ragged coat, of the Caſtletown hunt, a dirty flannel waiſtcoat and drawers; both of which were without buttons; brown worſted or yarn ſtockings, a pair of coarſe ſhoes without buckles and an old round hat, tied round with a pack-thread band. He fixed the rope round his own neck, firſt laying it bare, by taking off his cravat and unbuttoning his collar. He ſpoke to and ſhook hands with ſeveral of his acquaintance, and proceeded to the ladder. Mr. *Henry* the clergyman who reſided at Turlough houſe, following him. He deſired him to be ſhort, and having repeated one prayer, he ſhook Mr. *Henry* by the hand, and ſaid, good-by to you; on which he leaped with the utmoſt violence from the ladder, and the rope breaking, he fell to the ground. He immediately leaped up and looſened the rope from about his neck, and complained of the badneſs of it. Another rope being brought, and ſome time being ſpent in praying, he again went up the ladder, and required Mr. Henry, and the Revd. Mr Benton, to come and pray by him. Having prayed a conſiderable time, he drew down his cap, having previouſly told the executioner he would throw down his hat as a ſignal, when to be turned off; but after having prayed for ſome time, he pulled up his cap again. He prayed with the moſt fervent devotion, repeating the prayers aloud, and frequently ſending forth ſuch heavy ſighs, as would penetrate the moſt obdurate heart, with feelings of compaſſion. He remained near an hour on the ladder, during which

which time Mr. Henry and Mr. Benton alternately went to him. He drew down his cap and ſignified his intention of making ſignal to be turned off; he drew up the cap again, and requeſted Mr. Henry to come and pray with him. He held his (Mr. Henry's) hand, graſped within his own, and in the latter moment of his affliction he prayed with great marks of contrition, and devotion. The duſk of evening being ſet on, he was launch'd into eternity. From the inattention of the hangman in tying the rope too long, his toes touched the ground, until the humanity of a ſpectator raiſed up the body while the hangman ſhortened the rope. His body after hanging upwards of forty minutes, was cut down, and carried to his houſe at Turlough, and interred the next morning in the church yard of Turlough.

THE END.

No. 108, *GRAFTON-STREET.*

PAT. BYRNE respectfully informs his Friends, that Feeling every Thing relative to the Object of the present TRIAL, a matter of public curiosity; he has purchased the following Productions of that UNFORTUNATE GENTLEMAN, which he has for Sale, viz.

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